166-424

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 230.

ROBERT H. HUNT AND HUGH C. WARD, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED FEBRUARY 25, 1895.

(15,802.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 17, 1896.

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1 Pleas and proceedings in the United States circuit court of appeals for the eighth circuit at the May term, 1894, of said court, begun and held at the United States court-house, in the city of Saint Paul, Minnesota, on the first Monday in May, to wit, the seventh day of May, A. D. 1894, before the Honorable Henry C. Caldwell and Honorable Walter H. Sanborn, circuit judges, and Honorable Amos M. Thayer, district judge.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the eighth day of August, A. D. 1893, a transcript of record in pursuance to a writ of error directed to the district court of the United States for the western district of Missouri was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit in the case of Robert H. Hunt and Hugh C. Ward, plaintiffs in error, *vs.* The United States, defendant in error, which said transcript of record is in the words and figures following, to wit:

2 UNITED STATES OF AMERICA, *sct:*

The President of the United States of America to the honorable judges of the district court of the United States for the western division of the western district of Missouri, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, at the April term, 1893, thereof, between The United States, plaintiff, and Millard C. Curtis, Robert H. Hunt and Hugh C. Ward, defendants, a manifest error hath happened, to the great damage of the said defendants, Hunt and Ward, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceeding aforesaid, with all things concerning the same, to the United States circuit court of appeals, for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals, for the eighth circuit, on or before the 28th day of August, 1893, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court.

Issued at office in Kansas City, this third day of July, in the year of our Lord one thousand eight hundred and ninety-three.

JNO. M. NUCKOLS, *Clerk.*

Seal of the United States District Court, Western Division, Western District of Missouri.

Allowed by—

JNO. F. PHILIPS, *Judge.*

3 UNITED STATES OF AMERICA, } *sct:*
Western Division of the Western District of Missouri, }

In obedience to the command of the within writ, I herewith transmit to the United States circuit court of appeals, a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, affix the seal of said circuit court of the United States for the western division of the western district of Missouri.

Issued at office in Kansas City, this 25th day of July, A. D. 1893.

JNO. M. NUCKOLS, *Clerk.*

Seal of the United States District Court, Western Division, Western District of Missouri.

United States circuit court, western district of Missouri, western division. United States *vs.* M. C. Curtis *et al.* Writ of error. Filed July 3rd, 1893. Jno. M. Nuckols, clerk.

UNITED STATES OF AMERICA, *sct:*

To the United States, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the western division of the western district of Missouri, wherein Robert H. Hunt and Hugh C. Ward are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable John F. Philips, judge of the district court of the United States for the western division of the western district of Missouri, this 3rd day of July in the year of our Lord one thousand eight hundred and ninety-three.

JNO. F. PHILIPS, *Judge.*

4 UNITED STATES OF AMERICA, } *ss:*
Western Division of the Western District of Missouri, }

I hereby acknowledge service of the within citation this 5th day of July, A. D. 1893.

GEO. A. NEAL,
Attorney for Defendant in Error.

United States circuit court, western district of Missouri, western division. United States *vs.* M. C. Curtis *et al.* Citation. Filed July 3rd, 1893. Jno. M. Nuckols, clerk.

UNITED STATES OF AMERICA, *set:*

Be it remembered, that heretofore, to wit, at the regular November term, 1892, of the district court of the United States for the western division of the western district of Missouri, and on the 28th day of November, 1892, the following entry appears of record, to wit:

UNITED STATES }
vs. } 162.
MILLARD C. CURTIS. }

Whereas, Millard C. Curtis, Robert H. Hunt and Hugh C. Ward were recognized on the 24th day of September, 1892, before Jno. M. Nuckols, clerk of the United States district court for the western district of Missouri, in the sum of three *three* thousand dollars ($3,000), conditioned as follows: If the said Millard C. Curtis shall personally appear before the district court of the United States for the western district of Missouri, at Kansas City, Mo., on the first day of the next term thereof for the year 1892, to be begun and held at the city of Kansas, in said district, to answer any indictment or information which has been or which may be preferred against him for the offense whereof he stands charged, to wit, embezzling moneys from United States national bank, and submit to and obey all orders of said court during the pendency of said charge, and shall not at any time absent or depart from said court without leave thereof, then this recognizance to be void, otherwise to remain in full force and virtue.

Now comes the district attorney, on behalf of the United States, and the said Millard C. Curtis, although solemnly called to come into court in discharge of said recognizance, comes not, but makes default.

It is, therefore, ordered that the recognizance aforesaid be forfeited and that *scire facias* issue on said forfeiture against the said defendants returnable to the next term of this court, and that this be continued.

5 And afterwards, at the same said term of court and on the 16th day of January, 1893, the following further entry appears, to wit:

UNITED STATES
vs.
MILLARD C. CURTIS, HUGH C. WARD, and ROB'T H. HUNT. } 162.

Now comes the district attorney and moves the court that the writ of *scire facias* heretofore ordered by the court on the 28th day of November, 1892, be ordered by the court to issue forthwith, and the same being heard and considered by the court, it is ordered that the clerk of this court issue *scire facias* in said cause, directed to the sureties of said Millard C. Curtis in his recognizance given herein, of which forfeiture was taken on the 28th day of November, 1892, and a writ of *scire facias* then and there ordered as aforesaid, and that said writ issue forthwith as provided by law.

Thereupon a writ of *scire facias* was issued in words and figures as follows, to wit:

UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri, } *ss*:

The President of the United States of America to the marshal of the United States for the western district of Missouri, Greeting:

Whereas, Millard C. Curtis, Hugh C. Ward and Rob't H. Hunt were recognized before Jno. M. Nuckols, clerk of the district court of the United States for the western district of Missouri, on the 24th day of September, A. D. 1892, to wit: The said Millard C. Curtis in the sum of three thousand dollars, and the said Hugh C. Ward and Rob't H. Hunt in a like sum of three thousand dollars, to be levied of their respective goods and chattels, land and tenements, and to the United States rendered, if the said Millard C. Curtis should fail to comply with the conditions of said recognizance; yet to be void upon condition that the said Millard C. Curtis personally appear before the district court of the United States for the western district of Missouri, at the next term thereof, to be begun and holden at Kansas City, in said district, on the first Monday in November, A. D. 1892, and from term to term of said court as he may be ordered so to do, and not depart the same without the leave of said court, and shall obey all the orders of said court, and answer an indictment found against him for embezzling moneys from United States national bank, otherwise to remain in full force and virtue.

5½ Now comes the district attorney on behalf of the United States, and the said defendant, Millard C. Curtis, although solemnly called to come into court in discharge of his recognizance, comes not, but makes default, and the said Hugh C. Ward and Rob't H. Hunt, the sureties of the said Millard C. Curtis in the recognizance aforesaid, being also solemnly called and required to bring into court here the body of the said Millard C. Curtis, comes not, but wholly fail and refuse to produce before the court here the said Millard C. Curtis, according to the tenor of his said recognizance.

It is, therefore, considered, ordered and adjudged by the court, that the recognizance aforesaid of the said Millard C. Curtis and the

said Hugh C. Ward and Rob't H. Hunt be forfeited, and that a *scire facias* issue on said forfeiture against said Millard C. Curtis and his said sureties, Hugh C. Ward and Rob't H. Hunt, returnable to the next term of this court.

Therefore, you are hereby commanded to summon the said Millard C. Curtis and his sureties, the said Hugh C. Ward and Rob't H. Hunt, to be and appear before the district court of the United States for the western division of the western district of Missouri, to be begun and holden at Kansas City, the first Monday in April, next, A. D. 1893, then and to show cause, if any they have or can show, why judgment should not be rendered against them, according to the tenor of their said recognizance; and do you certify to our said court how you execute this writ.

Hereof fail not, and have you then and there this writ.

Witness, the Hon. Jno. F. Philips, judge of the United States for the western district of Missouri, this 16th day of January, A. D. 1893.

Issued at office in Kansas City, in said district, under the seal of said court, the day and year last above written.

JNO. M. NUCKOLS, *Clerk.*

The marshal's return of service as indorsed on the back of said writ is as follows:

I hereby certify that I have served the within writ be delivering a true copy thereof to Rob't H. Hunt at Kansas City, Jackson county, in the western division, western district of Missouri, this 6th day of March, 1893, and by delivering a true copy of the same to Hugh Ward at Kansas City, this 28th day of March, 1893.

JNO. P. TRACEY, *U. S. M.*,
Per J. K. SIDDELL, *D'p'ty.*

6 And afterwards, at the same said term of court and on the 26th day of April, 1893, the following further entry appears of record, to wit:

UNITED STATES
vs. } 162.
MILLARD C. CURTIS *et al.*

Now come Hugh C. Ward and Rob't H. Hunt, sureties in this cause, and move the court to vacate and set aside the order of forfeiture of recognizance and quash the writ of *scire facias* issued thereon.

Motion to vacate forfeiture of bond and to quash *scire facias* is in words and figures, to wit:

Forfeiture of Bond and Scire Facias Thereon.

In the District Court of the United States for the Western District of Missouri, at Kansas City, April Term, 1893.

UNITED STATES
vs.
MILLARD C. CURTIS, HUGH C. WARD, and ROBERT H. HUNT.

Now come Hugh C. Ward and Robert H. Hunt, defendants in the above cause, and move the court to vac-te and set aside the order of forfeiture of recognizance made and entered in the above cause at the last term of this court, and to quash the writ of *scire facias* issued thereon for the following reasons:

1st. Because neither this court nor the judge nor the clerk thereof had any jurisdiction of the person of M. C. Curtis, for the offense nor of the alleged offense with which he was then charged, at, before nor since the time of the filing and approval of the alleged bond.

2nd. Because the indictment in this cause wherein the forfeiture was taken by the attorney for the United States and entered by this court, contains no charge of the alleged offense for which the recognizance forfeited was given for the appearance of M. C. Curtis.

3rd. Because the provision of the act of Congress purporting to create the offense charged was enacted without authority and is in violation of the Constitution of the United States of America.

R. H. FIELD,
For Def'ts Ward and Hunt.

7 And afterwards, at the same said term of court, and on the 15th day of May, 1863, the following further entry appears, to wit:

UNITED STATES
vs.
MILLARD C. CURTIS *et al.* } 162.

This day comes the district attorney on behalf of the United States, and Hugh C. Ward, the surety to this cause, and the motion to quash the *scire facias* and set aside the order of forfeiture of recognizance being called for hearing, the same is argued by counsel and submitted to the court and by the court taken under advisement.

And afterwards at the same said term of court and on the 16th day of May, 1893, the following entry appears, to wit:

UNITED STATES
vs.
MILLARD C. CURTIS *et al.* } 162.

This day again come the parties, the district attorney on behalf of the United States, and Hugh C. Ward, surety to this cause, and

the motion to quash and set aside the *scire facias* and forfeiture of recognizance having been submitted and taken under advisement by the court, the same is by the court overruled.

And afterwards, at the same said term of court, and on the 18th day of May, 1893, the following entry appears, to wit:

UNITED STATES
vs.
MILLARD C. CURTIS, HUGH C. WARD, and ROB'T H. HUNT. } 162.

This day comes Hugh C. Ward on behalf of the defendants herein, and moves the court they be granted time in which to file an answer to the cause herein, and all and singular, the premises being seen and fully understood, the court doth grant said request, and the defendants are given until Monday, May 22nd, 1893, to file said answer.

And afterwards, at the same said term of court, and on the 22nd day of May, 1893, the following entry appears, to wit:

UNITED STATES
vs.
MILLARD C. CURTIS, HUGH C. WARD, and ROB'T H. HUNT. } 162.

Now comes Hugh C. Ward and Rob't H. Hunt, defendants, and by leave of court file answer and showing of cause to *scire facias* herein.

8 Said answer is in words and figures as follows, to wit:

Answer and Showing of Cause to Scire Facias Herein.

In the District Court of the United States for the Western Division of the Western District of Missouri, at Kansas City, May Term, 1893.

THE UNITED STATES
vs.
MILLARD C. CURTIS, ROB'T H. HUNT, and HUGH C. WARD. } 162.

Come now defendants, Rob't H. Hunt and Hugh C. Ward, and for answer to the *scire facias* issued herein January 16th, 1893, against them, and for showing of cause thereto, say:

First. On the 24th day of September, 1892, said defendants together with one Millard C. Curtis, entered into a recognizance before the clerk of this court in words and figures as follows, to wit:

"UNITED STATES OF AMERICA,
Western District of Missouri, City of Kansas City, } *ss:*

Be it remembered, that on this 24th day of September, A. D. 1892, before me, a clerk of the U. S. district court, for the western

district of Missouri, personally came M. C. Curtis, Rob't H. Hunt and Hugh C. Ward, and jointly and severally acknowledged themselves to owe the United States of America the sum of three thousand dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to wit:

The condition of this recognizance is such, that if said M. C. Curtis shall personally appear before the district court of the United States, in and for the district aforesaid, at Kansas City, Mo., on the 3rd day of the next regular term thereof, and then and there to answer the charge of having on or about the 2nd day of June, 1892, within said district, in violation of section 5209 of the Revised Statutes of the United States, unlawfully and feloniously did abstract, embezzle and wilfully misplace certain moneys of a certain banking association, to wit:

One hundred and fifty and $\frac{75}{100}$ dollars, with intent to defraud said national banking association, contrary to the form of the statutes in such case made and provided, viz., sec. 5209, and then and there abide the judgment of the said court, and not depart without leave thereof, then this recognizance to be void; otherwise to remain in full force and virtue.

M. C. CURTIS. [SEAL.]
ROBERT H. HUNT. [SEAL.]
HUGH C. WARD. [SEAL.]

9 Taken and acknowledged before me on the day and year first above written.

JOHN M. NUCKOLS,
Clerk U. S. Dist. Court."

Said defendants say that said clerk had no authority to take said recognizance. That said recognizance is, therefore, void, and for this reason judgment on said recognizance should not be rendered against said defendants.

Second. At the time said recognizance was entered into by said defendants, Ward and Hunt, and said M. C. Curtis, this court was not in session, and the judge thereof did not direct or authorize said recognizance to be taken by the clerk of this court. At that time neither this court, nor the judge, nor the clerk thereof had any right or authority to exact or receive any bond or recognizance from the said M. C. Curtis. Neither at that time nor before then had the said M. C. Curtis been lawfully brought before this court, the judge or clerk thereof, upon any process of law or pretense thereof, nor had he been committed by any United States commissioner, magistrate or other officer of this State to answer for any crime against the laws of the United States; nor had he been transferred to this judicial district from the State where arrested by any warrant of removal or other authority from any magistrate, judge or other authority of said State filed in this court, or with the judge or clerk thereof, to answer for any indictment, information or other complaint for violation any law of the United States in this district, then or thereafter to be filed, but the — M. C. Curtis was then

without having been arrested and brought before this court upon any process of law, detained and restrained of his liberty, and said recognizance was required by the officers of this court of him and these defendants to liberate him from an illegal and unwarranted detention of his person, and the same was executed for no other reason or consideration. Defendants, Ward and Hunt, therefore say that said recognizance is void, and that the judgment rendered against them should not be made absolute.

Third. The said M. C. Curtis was not called on the 3rd day of the November term of this court at Kansas City, Missouri, to answer the charge set forth and described in said recognizance as he should have been according to the terms thereof, and for this reason judgment on said recognizance should not be rendered against said defendants, Ward and Hunt.

Fourth. Said defendants as shown by the records of this court were not three times called to produce said M. C. Curtis, principal in said recognizance, to answer the charge set forth and described in said recognizance as they should have been before the alleged forfeiture of said recognizance was taken, as required by law, and for this reason judgment should not now be rendered on said recognizance against said defendants, Ward and Hunt.

Fifth. On the 28th day of November, 1892, as shown by the records of this court, the following order of forfeiture was entered of record:

"Whereas, Millard C. Curtis, Robert H. Hunt and Hugh C. Ward were recognized on the 24th day of September, 1892, before John M. Nuckols, clerk of the United States district court for the western district of Missouri, in the sum of $3,000, conditioned as follows: If the said Millard C. Curtis shall personally appear before the district court of the United States for the western district of Missouri at Kansas City, Mo., on the first day of the next term thereof for the year 1892, to be begun and held at the city of Kansas, in said district, to answer any indictment or information which has been or which may be preferred against him for the offense whereof he stands charged, to wit: embezzling moneys from the United States National bank, and submit to and obey all orders of said court during the pendency of said charge, and shall not at any time absent or depart from said court without leave thereof, then this recognizance to be void, otherwise to remain in full force and virtue.

Now comes the district attorney, on behalf the United States and the — Millard C. Curtis, although solemnly called to come into court and discharge said recognizance, comes not, but makes default.

It is, therefore, ordered that the recognizance aforesaid be forfeited, and that *scire facias* issue on said forfeiture against the said defendants, returnable to the next term of this court, and that this cause be continued."

Defendants, Ward and Hunt, say that there is a material variance between the conditions of said recognizance and those stated in said order or judgment of forfeiture, which said variance is fatal,

and for this reason judgment should not be rendered against them on said recognizance.

Sixth. For a further answer to said *scire facias* and showing of cause thereto, defendants, Ward and Hunt, deny each and every all-gation in said *scire facias* contained.

For each and all of the foregoing reasons said defendants say that judgment should not be rendered against them on said recognizance.

11 *Whereas*, said defendants pray that they may be discharged without liability from said recognizance.

R. H. FIELD AND
HUGH C. WARD,
Attorney- for Defendants.

And afterwards, at the same said term of court, and on the 25th day of May, 1893, the following entry appears, to wit:

UNITED STATES
vs.
MILLARD C. CURTIS *et al.* } 162.

Now comes the district attorney on behalf of the United States, and files demurrer to the answer of defendants herein.

Said demurrer to answer is in words and figures, to wit:

UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri.

In the District Court, April Term, 1893.

UNITED STATES OF AMERICA, Plaintiff,
vs.
MILLARD C. CURTIS, HUGH C. WARD, and ROB'T H. HUNT, Defendants.

Plaintiff, by Geo. A. Neal, United States attorney, demurs to the answer of defendants filed herein, because:

1st. The said answer does not show cause, sufficient in law, why judgment herein should not be made absolute.

2nd. Said answer does not state facts sufficient to constitute a defense herein.

Wherefore plaintiff prays the judgment of the court.

GEO. A. NEAL,
U. S. Attorney.

And, afterwards, at the same said term of court, and on the 6th day of June, 1893, the following entry appears, to wit:

UNITED STATES
vs.
MILLARD C. CURTIS *et al.* } 162.

This day comes Geo. A. Neal, on behalf of the United States, and files *for* reply to answer of defendants herein.

12 Said reply is in words and figures to wit:

Reply to Answer of Defendants.

UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri, } ss:

In the District Court, April Term, 1893.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
MILLARD C. CURTIS, HUGH C. WARD, and ROB'T H. HUNT, Defendants.

Now comes Geo. A. Neal, United States attorney, on behalf of the plaintiff herein, and for reply to the answer of defendants filed herein, denies each and every allegation contained in said answer and prays that final judgment be rendered against defendants herein.

And for other and further reply to said answer, plaintiff by its said attorney, states that on the 20th day of September, 1892, in the division and district aforesaid, the following complaint, affidavit and information duly sworn to in due form of law, was had and made, and lodged against the said Millard C. Curtis, before one L. E. Wyne, who was then and there a duly authorized and acting commissioner of the circuit court of the United States, for the district aforesaid, which said complaint, affidavit and information was in words and figures as follows, to wit:

UNITED STATES OF AMERICA,
Western District of Missouri, } ss:

Be it remembered that on this — day September, A. D. 1892, before me, a commissioner of the United States circuit court within and for the western district of Missouri, comes one J. E. McKee, who, being by me first duly sworn, on his oath says that on the 2nd day of June, 1891, at the western district of Misouri, one Millard C. Curtis was then and there the cashier, assistant cashier and agent of the American National Bank of Kansas City, Missouri, a national banking association, then and there organized under and by virtue of the laws of the United States, and then and there carrying on the business of banking at the city of Kansas City, in the State of Missouri; that on the day and date last aforesaid the said Millard C. Curtis being then and there the cashier, assistant cashier and agent aforesaid of said national banking association, did then and there, with force and arms, unlawfully, wilfully and feloniously abstract, embezzle and willfully misapply certain moneys of
13 said banking association, to wit, one hundred and fifty-three dollars and seventy-five cents ($153.75) thereof, with intent then and there in him, the said Millard C. Curtis, cashier, assistant cashier, and agent of the national banking association aforesaid, to defraud the said national banking association, contrary to the form

of the statutes in such cases made and provided and against the peace and dignity of the United States.

And the said affiant aforesaid, on his oath aforesaid, further says that on the 22nd day of April, A. D. 1891, at the western district of Missouri, the said Millard C. Curtis was then and there the cashier, assistant cashier and agent of the American National Bank of Kansas City, Missouri, a national banking association, then and there organized under and by virtue of the laws of the United States, and then and there carrying on the business of a national bank at Kansas City, Missouri; that on the day and date last aforesaid the said Millard C. Curtis, as such cashier, assistant cashier and agent of said national banking association aforesaid, did then and there unlawfully, willfully, knowingly, fraudulentiy and feloniously make a false entry in the books of the said national banking association, in a book of said association known as the "General Ledger C," at page 533, and which said book was then and there used by said association in carrying on said national banking business aforesaid, and which false entries so made as aforesaid are in the words and figures following, to wit, "Int. Nat. B'k of Barre, Vt., $265.00," and which entries purport to be a charge made to the contingent-fund account of said banking association, and to give information concerning the condition of the contingent fund — said banking association in the matter of interest paid to the said National Bank of Barre, of Vermont, he, the said Millard C. Curtis, then and there well knowing the said entries to be false, and made, as aforesaid, with the intent in him, the said Millard C. Curtis, to injure and defraud the said national banking association, the American National Bank of Kansas City, Missouri, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States.

(Signed) J. E. McKEE.

Subscribed and sworn to before me this 20th day of September, A. D. 1892.

L. E. WYNE,
Commissioner.

Whereupon the said commissioner issued in due form of law a warrant for the arrest of the said Curtis, which said warrant
14 was directed to the marshal for the western district of Missouri, and which said warrant was returned to said commissioner on the 20th day of September, 1892, by the said marshal, not served, the said marshal being unable to find the said Curtis in his said district; that the said Geo. A. Neal, United States attorney for plaintiff in the said district aforesaid, procured a certified copy of the complaint, affidavit and information and of the said warrant with the return of the said marshal indorsed thereon and forwarded the same to the United States attorney for the northern district of Illinois, requesting the said United States attorney to procure the arrest of the said Curtis if the same could be found in his said district; that pursuant to said request the said United States attorney

for said district on the 22nd day of September, 1892, caused and procured to be made a complaint, affidavit and information to be made and lodged against the said Curtis before one Philip Hoyne, a commissioner of the circuit court of the United States within and for the said northern district of Illinois, which said complaint was in words and figures as follows, to wit:

"NORTHERN DISTRICT OF ILLINOIS, } *sct:*
Northern Division, }

On this twenty-second day of September, A. D. 1892, at the city of Chicago, in the northern division of and the northern district of Illinois, before Philip A. Hoyne, a commissioner of the circuit court of the United States of America -or the said district, comes Frank Hitchcock of Chicago aforesaid, and upon his oath complains and says that Millard C. Curtis, late of Jackson county, State of Missouri, on or about the second day of June, A. D. 1892, at Jackson county aforesaid, in the western district of Missouri, being then and there cashier, assistant cashier and agent of the American National Bank of Kansas City, Missouri, a national banking association then and there organized under and by virtue of the laws of the United States, willfully and feloniously did abstract, embezzle and willfully misapply certain moneys of said banking association, to wit, one hundred and fifty and $\frac{75}{100}$ dollars, with intent to defraud said national banking association, contrary to the form of the statutes in such cases made and provided, viz., section 5209 R. S., wherefore this complainant prays that the said Millard C. Curtis may be apprehended and further dealt with according to law.

(Signed) FRANK HITCHCOCK.

Subscribed and sworn to before me by the above-named Frank Hitchcock, the day and year first above written.

P. A. HOYNE,
Commissioner."

15 Whereupon the said commissioner issued his warrant in due form of law directed to the marshal of the northern district of Illinois, or to any of his deputies, commanding such to arrest the said Curtis and take the same before the said commissioner; that said marshal duly executed said warrant on the 22nd day of September, 1892, by arresting the said Curtis and by taking him before the said commissioner as commanded by said warrant; that said Curtis, when brought before the said commissioner as aforesaid, waived examination into said complaint and was by said commissioner required to enter into recognizance in the sum of ten thousand dollars, conditioned that he should appear at the next term of court at the said district court for the western district of Missouri; and the said Curtis failing to enter into said recognizance was by said commissioner committed to the custody of the marshal of the said northern district of Illinois, and in the custody of the jailor of Cook county in said district; that on the 23rd day of Sep-

tember, 1892, the Honorable Walter Q. Gresham, United States circuit judge for the said northern district of Illinois, duly made an order in form of law directing that said Curtis be transferred to the western district of Missouri, as provided by law; that on the — day of September, 1892, in obedience to said order of transfer the marshal of the said northern district of Illinois, duly transferred said Curtis to the western district of Missouri, and gave him into the custody of the marshal of the western district of Missouri; that said marshal took the said Curtis before John M. Nuckols, a commissioner of the circuit court within and for the western district of Missouri, duly authorized and acting as such commissioner, who duly committed the said Curtis in due form of law, and as provided by law, to the jail of Jackson county, Missouri, until he should be discharged by due process of law; that he was duly placed in the jail aforesaid and into the keeping of the marshal of Jackson county, Missouri, the jailor of said jail, and by him duly received by virtue of the proceedings aforesaid.

And plaintiff further states, by its attorney aforesaid, that on the 24th day of September, 1892, one Henry Woolman, Esq., and one Thomas Morrow, Esq., attorneys-at-law, duly licensed and enrolled as members of the bar of this court, appear-d before the Honorable Jno. F. Philips, judge of this court, in chambers, and the said Curtis, by said attorneys, in all and singular directing and consenting thereto, appeared before the said judge as aforesaid, and the said Geo. A. Neal, United States attorney, appeared on behalf of the plaintiff herein, when the said Curtis as aforesaid, by his attorneys aforesaid, made application to the said judge, at his chambers
16 aforesaid, and prayed the said judge to reduce the amount fixed and required by the said commissioner aforesaid, and that the said judge should fix the amount of bail required of said Curtis and admit him to bail; that said application was duly heard by said judge as aforesaid and was duly considered, and who then and there ordered that the said bail of the said Curtis should be fixed at the sum of three thousand dollars; that said Curtis and his said counsel were not then and there prepared and ready to enter into recognizance and give bail so fixed as aforesaid, and requested to be allowed time to prepare the said recognizance and to procure sureties in that behalf, which said request was then and there granted by the said judge; that the Honorable John F. Philips, the said judge, after the determination of the matters aforesaid, prepared to leave his said chambers with the intention of being absent some days therefrom; that he then and there and at the request of the said Curtis, by his counsel aforesaid, then and there made an order, which was reduced to writing and was directed to the clerk of this court, which said order was then and there signed by the said judge, and in which he directed and ordered the said clerk to take and approve a recognizance on behalf of the said Curtis, for the purposes aforesaid, in the said sum of three thousand dollars, with good and sufficient sureties, which said order was in words and figures as follows, to wit:

"KANSAS CITY, MO., *Sept. 24t-*, 1892.

John M. Nuckols, U. S. dist. clerk:

In the case of The U. S. *vs.* M. C. Curtis, you may approve recognizance for him in the sum of three thousand dollars, with two sureties in addition to the principal, the same to be sufficient and approved by you.

(Signed) JNO. F. PHILIPS, *Judge.*"

That said order was delivered to the said Curtis and his said counsel for the purpose of presenting the same to the said clerk for the purpose aforesaid; that on the 26th day of September, 1892, the said Curtis, by his said attorneys, and in person entered into a recognizance in writing (which is the said recognizance in this cause) before the said John M. Nuckols, the said clerk as aforesaid, in the absence of the said judge, with one Robert H. Hunt and Hugh C. Ward, the defendants herein, as his sureties, which said recognizance was signed by the said Curtis and by the said Ward and Hunt as sureties before the said clerk, who duly approved the same by virtue of the order aforesaid, and that the said Curtis was by virtue of the same
17 set at liberty and was discharged from the custody aforesaid into the custody of his said sureties; that at the time of the signing and at no other time, did the said Curtis nor his said sureties object to the taking of the said recognizance in the manner and by the officer aforesaid, and plaintiff avers that the release and discha*g*re of the said Curtis as aforesaid was caused by the said Curtis and his said sureties as aforesaid, and that they are estopped from denying the right and authority of the said officer in the premises aforesaid.

Plaintiff further states that said recognizance was duly filed in the office of the clerk of the district court of this division and district, and that at the next regular term of this court thereafter, and on the 14th day of November, 1892, the grand jury of said court in manner of law returned into said court three several bills of indictment against the said Curtis, to wit: one indictment charging the said Curtis in substance and in due form with abstracting and embezzling the funds of the American National Bank of Kansas City, Missouri; one indictment charging the said Curtis with fraudulently issuing a bill of exchange on said bank without authority from the board of directors of said bank so to do; one indictment charging said Curtis with making false entries in the books of said bank, all of which said indictments were in due form of law, and were duly filed in said court and became a part of the records of the complainants of the United States against the said Curtis, and all of which were for violations of section 5209 of the Revised Statutes of the United States, for violation of which said section defendants were recognized on the part of the said Curtis to appear.

Plaintiff further states that said indictments were duly entered upon the dockets of the judge, clerk and the U. S. attorney of said court, and that on the 28th day of November, 1892, the said Curtis was duly called in open court in due form and manner to plead to said indictments, but did not respond and made default; that his

sureties were then duly called as aforesaid, but made default; that said recognizance was then and there taken, duly declared and adjudged forfeited, and entry of forfeiture entered of record and writ of *scire facias* ordered on the same.

Wherefore, plaintiff having fully replied to the answer of defendants, prays judgment of forfeiture heretofore rendered be made final and that execution issue thereon.

GEO. A. NEAL,
United States Attorney.

18 And at the same said term of court, on the 5th day of June, A. D. 1893, a stipulation waiving a jury was filed.

Said stipulation is in words and figures as follows, to wit:

Stipulation Waiving a Jury.

In the District Court of the United States for the Western *District* of the Western District of Missouri, May Term, 1893.

UNITED STATES, Plaintiff,
vs.
M. C. CURTIS, ROBERT H. HUNT, and HUGH C. WARD, Defendants.

It is hereby stipulated and agreed by and between the parties hereto that a jury in the above-entitled cause may be waived, and said cause tried by the court.

Dated June 5th, 1893.

GEO. A. NEAL,
Attorney for Plaintiff.
R. H. FIELD AND
HUGH C. WARD,
Attorneys for Defendants.

And afterwards, at the same said term of court, and on the 12th day of *of* June, 1893, the following entry appears, to wit:

UNITED STATES
vs.
MILLARD C. CURTIS *et al.* } 162.

Thi*d* day comes the district attorney on behalf of the United States, and the defendants, R. H. Hunt and Hugh C. Ward, by their attorney, Judge Richard Field, and this cause coming up for hearing, evidence is heard, and now this cause is continued for further hearing till Wednesday morning at ten o'clock.

And afterwards, at the same said term of court, and on the 14th day of June, 1893, the following entry appears, to wit:

UNITED STATES
vs.
MILLARD C. CURTIS *et al.* } 162.

This day again come the parties to this cause, the district attorney on behalf of the United States, and the defendant, Hugh C. Ward, as well, as by his attorney, Judge Richard Field, and further evidence is heard and this cause is submitted to the court and by the court taken under advisement.

19 And at the same said term of court, and on the 3rd day of July, 1893, the following entry appears, to wit:

UNITED STATES
vs.
HUGH C. WARD and ROB'T H. HUNT. } 162.

Now on this day, being the regular term of the April term of the United States district court, within and for the western district of Missouri, this cause coming on to be heard and Geo. A. Neal, United States attorney, being present on behalf of the plaintiff, and the defendants, Hugh C. Ward and Rob't H. Hunt, being present in person and by attorney, and this cause having been heretofore submitted to the court on the 14th day of June, A. D. 1893, and by the court taken under advisement, and the court now being fully advised of all and singular the matters and things submitted as aforesaid, and having fully considered the premises, doth find the issues on behalf of the plaintiff, and doth order and adjudge that the plaintiff have judgment for the penalty of the recognizance and bond forfeited and sued on herein, and that plaintiff have and recover of and from the said defendants herein, Hugh C. Ward and Rob't H. Hunt, in the sum of three thousand dollars ($3,000) and that execution issue therefor.

And at the same term of court and on the 3rd day of July, 1893, the following further entry appears, to wit:

UNITED STATES
vs.
MILLARD C. CURTIS, HUGH C. WARD and ROB'T H. HUNT. } 162.

This day come the parties by their attorneys, the plaintiff by Geo. A. Neal, and the defendants, Rob't H. Hunt and Hugh C. Ward, by R. H. Field. Thereupon, by consent of parties, the court doth order that the time for preparing, presenting and filing the bill of exceptions in this cause be extended until August 1st, 1893, at which time the bill of exceptions may be presented, allowed and signed and sealed, with the same force and effect as if said action had been had or taken within the time prescribed by the rules of this court.

(Signed) JNO. F. PHILIPS, *Judge.*

And afterwards, on the 15th day of July, A. D. 1893, a bill of exceptions was filed, said bill is in words and figures as follows, to wit:

20 *Bill of Exceptions.*

In the District Court of the United States in and for the Western Division of the Western District of Missouri.

THE UNITED STATES, Plaintiff,
vs.
M. C. CURTIS, ROB'T H. HUNT, and HUGH C. WARD, Defendants.

Be it remembered, that on the 6th day of June, 1893, and at the May term, 1893, of said district court, this cause coming on to be heard before the Hon. John F. Philips, judge of said court, the plaintiff appearing by George A. Neal, United States district attorney for the western district of Missouri, and the defendants, Robert H. Hunt and Hugh C. Ward, appearing by their attorneys, Messrs. R. H. Field and Hugh C. Ward, the following proceedings were had, to wit:

The plaintiff to sustain the issues on its behalf, offered evidence, oral and documentary, in words and figures as follows:

Plaintiff offered first the complaint of J. E. McKee made in Kansas City, Missouri, Sept. 20th, 1892, before L. E. Wyne, United States commissioner, charging Millard C. Curtis with making false entries in the books of the American National Bank of Kansas City, Missouri, and with embezzling and misapplying certain moneys of the American National Bank of Kansas City, Missouri, and the warrant for the arrest of said Curtis issued by said Wyne, which in words and figures were as follows, to wit:

"UNITED STATES OF AMERICA,
Western District of Missouri, } *ss.*:

Be it remembered that on this — day of September, A. D. 1892, before me, a commissioner of the United States circuit court within and for the western district of Missouri, comes one J. E. McKee, who being by me first duly sworn, on his oath says that on the 2nd day of June, 1891, at the western district of Missouri, one Millard C. Curtis was then and there the cashier, assistant cashier and agent of the American National Bank of Kansas City, Missouri, a national banking association then and there organized under and by virtue of the laws of the United States and then and there carrying on the business of banking at the city of Kansas City, in the State of Missouri; that on the day and date last aforesaid, the said Millard C. Curtis, being then and there the cashier, assistant cashier and agent aforesaid of said national banking association, did then and
21 there, with force and arms, unlawfully, willfully and feloniously abstract, embezzle and willfully misapply certain moneys of said banking association, to wit: one hundred and fifty-three dollars and seventy-five cents ($153.75) thereof, with intent

then and there in him, the said Millard C. Curtis, cashier, assistant cashier and agent of the national banking association aforesaid, to defraud the said national banking association, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States.

And the said affiant aforesaid, on his oath aforesaid, further says that on the 22nd day of April, A. D. 1891, at the western district of Missouri, the said Millard C. Curtis was then and there the cashier, assistant cashier and agent of the American National Bank of Kansas City, Missouri, a national banking association then and there organized under and by virtue of the laws of the United States, and then and there carrying on the business of a national bank at Kansas City, Missouri, that on the day and date last aforesaid, the said Millard C. Curtis, as such cashier, assistant cashier and agent of said national banking association aforesaid, did then and there unlawfully, willfully, knowingly, fraud-lently and feloniously make a false entry in the books of the said national banking association, in a book of said association known as the Goneral Ledger 'C,' at page 533, and which said book was then and there used by said association in carrying on said national banking business aforesaid, and which said false entries so made as aforesaid are in the words and figures following, to wit: 'Int. Nat. B'k Barre, Vt. $265.00,' and which entries purport to be a charge made to the contingent-fund account of said banking association, and to give information concerning the condition of the conti/gent fund of said banking association in the matter of interest paid to the said National Bank of Barre, Vermont, he, the said Millard C. Curtis, then and there well knowing the said entries to be false and made as aforesaid with the intent in him, the said Millard C. Curtis, to injure and defraud the said national banking association, the American National Bank of Kansas City, Missouri, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States.

(Signed) J. E. McKEE.

Subscribed and sworn to before me this 20th day of September, A. D. 1892.

L. E. WYNE,
Commissioner.

Filed Sept. 20th, 1893.

L. E. WYNE, *Com'r.*"

22 The President of the United States of America to the marshal of the United States for the western district of Missouri and his deputies or any or either of them:

Whereas, J. E. McKee has made complaint in writing under oath before me, the undersigned commissioner of the circuit court of the United States for the western district of Missouri, charging that Millard C. Curtis, late of Jackson county, in the State of Missouri, did, on or about the 2nd day of June, A. D. 1891, at Jackson county, in said district, in violation of section — of the Revised Statutes of

the United States, unlawfully, being then and there cashier, assistant cashier and agent of the American National Bank of Kansas City, Missouri, a national banking association, then and there organized under and by virtue of the laws of the United States, willfully and feloniously, abstract, embezzle and willfully misapply certain moneys of said banking association, to wit: one hundred and fifty and $\frac{75}{100}$ dollars, with intent to defraud said national banking association.

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, — apprehend the said Millard C. Curtis wherever found in your district, and bring him bodily forthwith before me or any other commissioner having jurisdiction of said matter, to answer the said complaint, that he may then and there be dealt with according to law for said offense.

Given under my hand and seal this 20th day of September, A. D. 1892.

L. E. WYNE,
Commissioner of the Circuit Court of the United States for the Western District of Missouri.

Return.

Received this warrant on the 20th day of September, 1892, at Kansas City, the within not found in this district — at —— on the — day of ——, 18—, and have h— bod— now in court as within I am commanded.

JNO. P. TRACEY,
U. S. Marshal,
Per J. K. SIDDELL, *Deputy.*

20 day of Sep., 1892.

23 UNITED STATES OF AMERICA, }
Western District of Missouri, } ss:

I, L. E. Wyne, a commissioner of the circuit court of the United States for said district, do h-reby certify that the foregoing is a true copy of the complaint filed with me on the 20th day of September, 1892, in the case of The United States against Millard C. Curtis; also a warrant issued therein, and the return on said warrant.

Witness my hand and seal this 20th day of September, 1892.

[SEAL.] L. E. WYNE,
Commissioner.

Plaintiff next offered the complaint of Frank Hitchcock, made in the city of Chicago, September 22nd, 1892, before Philip A. Hoyne, United States commissioner, charging Millaed C. Curtis with embezzling and misapplying certain moneys of the American National Bank of Kansas City, Missouri, the warrant for the arrest of said Curtis issued by Hoyne, and the order of commitment of said Curtis to the Cook county jail, which complaint, warrant and commitment in words and figures are as follows, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division.

Before Philip A. Hoyne, a commissioner of the circuit court of the United States of America for the northern district of Illinois, at the city of Chicago, in the said division and district.

UNITED STATES OF AMERICA
vs.
MILLARD C. CURTIS.

Charge.—Violation banking laws, to wit, sec. 5209, R. S., being cashier, assistant cashier and agent, and embezzling moneys of a national banking association.

1892.
Sep. 22. Affidavit of Frank Hitchcock filed.
Sep. 22. Warrant issued. Defendant in court in person. The United States by Thomas E. Milchrist, Esq., U. S. att'y. The defendant waives examination, and he is ordered to enter into recognizance with sufficient surety in the penalty of ten thousand dollars, for his appearance in the trial of said charge at the March term of the district court of the United States for the western district of Missouri, western division; in default whereof a mittimus is issued.

"NORTHERN DISTRICT OF ILLINOIS, *sct:*

On this twenty-second day of Sep., A. D. 1892, at the city of Chicago, in the northern division of the northern district of
24 Illinois, before Philip A. Hoyne, a commissioner of the circuit court of the United States of America for the said district, comes Frank Hitchcock of Chicago aforesaid, and upon his oath complains and says, that Millard C. Curtis late of Jackson county, State of Missouri, on or about the second day of June, A. D. 1892, at Jackson county aforesaid, in the western district of Missouri, being then and there cashier, assistant cashier and agent of the American National Bank of Kansas City, Missouri, a national banking association, then and there organized under and by virtue of the laws of the United States, willfully and feloniously, did abstract, embezzle and willfully misapply certain moneys of said banking association, to wit; one hundred and fifty and $\frac{75}{100}$ dollars with intent to defraud said national banking association; contrary to the form of the statutes in such case made and provided, section 5209, R. S.

Wherefore this complainant prays that the said Millard C. Curtis may be apprehended, and further dealt with according to law.

Subscribed and sworn before me by the above-named Frank Hitchcock, the day and year first above written.

(Signed) P. A. HOYNE,
Commissioner.

(Signed) FRANK HITCHCOCK.

The President of the United States of America to the marshal of the United States for the northern district of Illinois and to any of his deputies or to any or either of them:

Whereas, complaint on oath has been made to me, charging that Millard C. Curtis, did, on or about the second day of June, in the year one thousand eight hundred and ninety-two, at Jackson county, in the western district of Missouri, violate the banking laws of the United States, to wit, section 5209 of the Revised Statutes; he then and there being cashier, assistant cashier and agent of a national banking association organized under the laws of the United States, and feloniously abstracting, embezzling and willfully misapplying certain moneys of said association, with intent to defraud the said association;

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said Millard C. Curtis, and bring his body forthwith before me, Philip A. Hoyne, United States commissioner, or some judge of justice of the United States, or other United States commissioner, wherever he may be found, that he may then and there be dealt with according to law for the said offense.

Given under my hand and seal, this 22nd day of September, in the year of our Lord one thousand eight hundred and ninety-two, and of our Independence the 117th year.

[SEAL.]

(Signed) P. A. HOYNE,
U. S. Commissioner for the Northern District of Illinois.

I have executed the within warrant by arresting Millard C. C. Curtis, therein named, and taking him before Philip A. Hoyne, U. S. commissioner, this 22nd day of September, 1892.

(Signed) FRANK HITCHCOCK,
United States Marshal,
By H. E. CHARLES, *Deputy.*

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, Northern Division, }

The President of the United States of America to the marshal of the northern district of Illinois and to the keeper of the jail of the county of Cook, Greeting:

Whereas, Millard C. Curtis has been arrested and brought before me, Philip A. Hoyne, a commissioner, appointed by the circuit court of the United States of America, in and for the northern district of Illinois, under and by virtue of the act of Congress in that behalf, approved February 20th, 1812, and of the acts amendatory thereof, for examination, by virtue of a warrant issued by me, upon the complaint of Frank Hitchcock, made before me in writing, on oath, charging the said Millard C. Curtis with violating the banking laws of the United States, to wit: section 5209 of the Revised Statutes, in being cashier, assistant cashier, and agent of a certain banking association, organized under the laws of the United States, and em-

bezzling and misapplying certain of the moneys of said association with intent to defraud said association.

And whereas, on such examination, it appears to me that there is probable cause to believe the said Millard C. Curtis guilty of said offense, and I have directed him to enter into recognizance with sufficient surety in the penalty of ten thousand dollars for his appearance for trial on said charge, at the March term of the
26 district court of the United States for the western district of Missouri, western division, or, in default thereof, that he be committed to the jail of Cook county, in said district. And whereas, the said Millard C. Curtis has not offered such recognizance, you, the said marshal, are hereby commanded that you convey the said Millard C. Curtis to the jail of the county of Cook, and you, the said keeper of the said jail, are hereby comma-ded that you receive the said Millard C. Curtis into said jail, and him there safely and securely keep until he be discharged therefrom by due course of law.

In witness whereof I have hereunto set my hand and seal, at Chicago, in said district, this 22nd day of September, 1892, and of the Independence of the United States the 117 year.

[SEAL.]

(Signed) PHILIP A. HOYNE,
U. S. Commissioner, Northern District of Illinois.

NORTHERN DISTRICT OF ILLINOIS, } *sct:*
Northern Division, }

I, Philip A. Hoyne, a commissioner of the circuit court of the United States of America for the northern district of Illinois, do hereby certify that the foregoing is a true transcript of the proceedings had in the above-entitled cause, lately pending before me; and that the papers numbered 1 to 3, inclusive, accompanying this transcript, are the original papers in said cause, which transcript and papers are herewith returned to the district court of the United States for the western district of Missouri, in pursuance of law.

In witness whereof I hereunto set my hand, at the city of Chicago, in the northern division of the northern district of Illinois, this 23rd day of September, A. D. 1892.

(Signed) P. A. HOYNE,
U. S. Commissioner."

Plaintiff then offered the following recognizance, in words and figures as follows, to wit:

UNITED STATES OF AMERICA, } *ss:*
Western District of Missouri, City of Kansas City, }

Be it remembered, that on this 24th day of September, A. D. 1892, before me, a clerk of the U. S. district court, for the said western district of Missouri, personally came M. C. Curtis, Rob-
27 ert H. Hunt and Hugh C. Ward, and jointly and severally acknowledge themselves to owe the United States of America the sum of three thousand dollars, to be levied on their goods and

chattels, lands and tenements, if default be made in the condition following, to wit:

The condition of this recognizance is such that if said M. C. Curtis shall personally appear before the district court of the United States in and for the district aforesaid, at Kansas City, Mo., on the 3rd day of the next regular term thereof, and then and there to answer the charge of having on or about the 2nd day of June, 1892, within said district, in violation of section 5209 of the Resived Statutes of the United States, unlawfully and feloniously did abstract, embezzle and wilfully misapply certain moneys of a certain banking association, to wit: one hundred and fifty and $\frac{75}{100}$ dollars, with intent to defraud said national banking association, contrary to the form of the statutes in such case made and provided, viz: sec. 5209, and then and there abide the judgment of the said court, and *and* not depart without leave thereof, then this recognizance to be void, otherwise remain in full force and virtue.

M. C. CURTIS. [SEAL.]
ROBERT H. HUNT. [SEAL.]
HUGH C. WARD. [SEAL.]

Taken and acknowledged before me on the day and year first above written.

JOHN M. NUCKOLS,
Clerk U. S. Dist. Court.

Done by order Hon. John F. Philips, judge U. S. dist. court for west. dist. of Missouri, hereto attached.

Recognizance for appearance. Filed 26th of Sept., 1892. John M. Nuckols, clerk.

The defendants at the time objected to the introduction of the foregoing recognizance for the reason that the same was not taken by an officer authorized by law, and, therefore, void. Which objection the court overruled; to which ruling of the court the defendants at the time duly excepted.

Plaintiff also offered in evidence three indictments returned by the grand jury of the United States into the district court of the United States for the western division of the western district of Missouri, November 14th, 1892, which indictments were separately numbered and docketed in said court, the first, No. 1302, United States *vs.* Millard C. Curtis, charging said Curtis with making
28 false entries in the books of the American National Bank of Kansas City, Missouri; the second, No. 1336, United States *vs.* Millard C. Curtis, charging said Curtis with fraudulently issuing bills of exchange on said bank; the third, No. 1335, United States *vs.* Millard C. Curtis, charging said Curtis with abstracting, embezzling and misapplying certain moneys of said bank.

The following judgment of forfeiture of the recognizance in suit was offered by plaintiff.

UNITED STATES
vs.
MILLARD C. CURTIS. } 1302.

NOVEMBER 28TH, 1892.

Whereas, Millard C. Curtis, Robert H. Hunt, and Hugh C. Ward were recognized on the 24th day of September, 1892, before John M. Nuckols, clerk of the United States district court for the western district of Missouri, in the sum of three thousand dollars ($3,000) conditioned as follows: If the said Millard C. Curtis shall personally appear before the district court of the United States, for the western district of Missouri, at Kansas City, Mo., on the first day of the next term thereof for the year 1892, to be begun and held at the city of Kansas in said district, to answer any indictment or information which has been or which may be preferred against him for the offence whereof he stands charged, to wit: embezzling moneys from the United States National bank, and submit to and obey all orders of said court during the pendency of said charge, and shall not at any time absent or depart from said court without leave thereof; then this recognizance to be void, otherwise to remain in full force and virtue.

Now comes the district attorney on behalf of the United States and the Millard C. Curtis, although solemnly called to come into court in discharge of said recognizance, comes not but makes default.

It is therefore ordered that the recognizance aforesaid be forfeited, and that *scire facias* issue on said forfeiture against the said defendants returnable to the next term of this court and that this case be continued.

The witness, CHARLES PEABODY, on behalf of plaintiff, testified as follows:

I was the crier of the U. S. district court at this city in the western division of the western district of Missouri during the Nov. term, 1892. I remember the taking of the forfeiture of the recognizance of M. C. Curtis, and that I was directed to call and did call M. C. Curtis, Hugh C. Ward, and R. H. Hunt.

29 The defendants at the time objected to the testimony of said witness because oral evidence in a *scire facias* proceeding on a forfeited recognizance in this State was incompetent and illegal. Which objection the court overruled; to which ruling of the court defendants at the time duly excepted.

JOHN M. NUCKOLS, on behalf of plaintiff, testified as follows:

I am clerk of the U. S. district court, for the western division of the western district of Missouri, and was clerk during the Nov. term, 1892. The recognizance in this case was acknowledged before me, and I took the acknowledgment by virtue of the direction and order of the judge of this court, which was exhibited to me by Mr. Wollman and Mr. Morrow, the attorneys of Curtis. Neither Curtis nor his sureties made any objection to my authority to take the ac-

knowledgment nor that Curtis was illegally in custody. I issued at the request of the deputy marshal of this district the following order of commitment:

UNITED STATES OF AMERICA, } ss:
Western Division of the Western District of Missouri, }

The President of the United States of America to the marshal of the United States for the western district of Missouri, Greeting:

Whereas, Millard C. Curtis, charged in said court with the offense of embezzling and misapplying moneys belonging to a certain banking association, has been sentenced to — days' imprisonment in the Jackson County jail at Kansas City, Missouri;

These are therefore to command you forthwith to convey and deliver said M. C. Curtis to said jail, into the custody of the jailor thereof, together with a copy of this judgment; and do you make due return thereof.

Witness, the Hon. Jno. F. Philips, district judge of the United States for said district, this 24th day of September, [SEAL.] A. D. 1892.

Issued under the seal of said court, at office in the city of Kansas, the day and date aforesaid.

JOHN M. NUCKOLS, *Clerk*,
By —— ——, *D. C.*

30 *Return.*

I hereby certify that I executed the within writ by delivering the body of M. C. Curtis to H. P. Stewart, county marshal, at Kansas City, Mo. All done in the western district of Mo.

JOHN P. TRACEY,
U. S. Marshal.
JOHN OECHSLI, *Deputy.*

Curtis was not brought before me at the time, nor was there then any indictment or information filed against him in this court. I issued the commitment only because so requested by the deputy marshal. The proceedings hereinbefore set forth as had before Com. Wyne, were filed in the office of the clerk of this court, before Curtis was bro-ght to this city from Chicago. The marshal who brought Curtis to this city did not file in my office the order of removal under which he was brought from Chicago. Judge Philips, the judge of this court, was absent from his chambers the day I took the recognizance. I do not know where he was at that time.

Defendants at the time objected to the foregoing evidence of the witness, Nuckols, for the reason that oral evidence was incompetent and illegal in a *scire facias* proceeding on a forfeited recognizance in this State. Which objection was by the court overruled; and the action of the court in so doing was at the time duly excepted to by defendants.

The order referred to by the witness, Nuckols, is in words and figures as follows, to wit:

KANSAS CITY, MO., *Sept. 24th*, 1892.

John M. Nuckols, U. S. dist. clerk:

In the matter of The U. S. *vs.* M. C. Curtis, you may approve recognizance for him in the sum of three thousand dollars, with two sureties in addition to the principal, the same to be sufficient and approved by you.

JNO. F. PHILIPS, *Judge.*

The witness, H. E. CHARLES, on behalf of the plaintiff, testifies as follows:

I am a deputy U. S. marshal for the northern district of Ill. I brought Curtis to this district on the order of removal made by Judge Gresham, judge of the U. S. circuit court for the northern district of Ill. Judge Gresham was holding the circuit court
31 in Chicago on that day. The district court was not in session. I do not know where the district judge was at the time Judge Gresham made the order. Judge Gresham frequently made these orders of removal of prisoners in our custody. When I brought Curtis to this district on the order, I delivered him to the marshal of this district and took his receipt on the order. It was the custom and practice of the marshal's office of our district to take the original orders of removal back with us and return the same to the court making the order. We did not understand that we were required to leave the original order of removal with the clerk of the district to which we removed the prisoner. I did not leave the order with the clerk here, nor a copy with any officer here, because I did not understand that it was my duty to do so. I returned to Chicago on the evening of Sept. 24th, 1892, carrying with me the warrant of removal under which I brought Curtis to Kansas City and filed it with the clerk of the U. S. circuit court at Chicago, where it has since been filed until yesterday, when I got it to bring here. I have the order made by Judge Gresham with me and the one I had with me and by authority of which I brought Curtis to this district.

I arrested Curtis on a warrant issued by Commissioner Hoyne of Chicago. Curtis waived examination. The com. fixed his bond at $10,000, which he failed to give. He was then committed by the com. I then went to Judge Gresham for the order of removal which was made as stated.

Defendants objected to the foregoing evidence of the said Charles for the reason that oral evidence was incompetent and illegal in a *scire facias* proceeding on a forfeited recognizance in this State. Which objection the court overruled and the defendants at the time duly excepted to said ruling. The order of removal offered in evidence and referred to by the witness Charles in the foregoing testimony in words and figures is as follows, to wit:

Walter Q. Gresham, judge of the circuit court of the United States of America for the northern district of Illinois, to the marshal of the same district, Greeting:

Whereas, Millard C. Curtis has been committed to jail under and by virtue of a commitment made by an United States commissioner for this district, a copy of which commitment is hereto annexed; and the United States attorney for this district has made application to me for a warrant for the removal of the said prisoner, under the provisions of section 1014 of the Revised Statutes, to the western district of Missouri, in which district the offense for
32 which he has been so committed is to be tried; and the said prisoner has been brought before me, and due examination of the matter has been made.

Therefore you are hereby commanded, in the name and by the authority of the said United States, that you forthwith remove the said prisoner, now in your custody, to the said western district of Missouri, and there deliver him to the marshal of that district, in order that the said prisoner may be dealt with according to law.

Given under my hand, and the seal of the said district court, at Chicago, in the said northern district of Illinois, this twenty-third day of September, A. D. 1892, and of the Independence of the said United States the 117th year.

W. Q. GRESHAM,
Circuit Judge.

Attest: ——— ———, *Clerk.*

Received the prisoner, Millard C. Curtis, named in this warrant, from Frank Hitchcock, marshal of the northern district of Illinois, at Kansas City, in the western district of Missouri, this 24 day of September, A. D. 1892.

JNO. P. TRACEY,
U. S. Marshal, Western District of Missouri,
By JNO. TRACEY, *Deputy.*

By virtue of this warrant, I removed the prisoner, Millard C. Curtis, therein named, to Kansas City, in the western district of Missouri, and there delivered him to the marshal of that district, the 24th day of September, A. D. 1892.

FRANK HITCHCOCK,
U. S. Mars-al, Northern District of Illinois,
By H. E. CHARLES, *Deputy.*

Marshal's fees: ———.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, Northern Division, }

The President of the United States of America to the marshal of the northern district of Illinois, and to the keeper of the jail of the county of Cook, Greeting:

Whereas, Millard C. Curtis — been arrested and brought before me, Philip A. Hoyne, a commis-ioner appointed by the circuit

court of the United States of America, in and for the northern district of Illinois, under and by virtue of the act of Congress
33 in that behalf, approved February 20, 1812, and of the acts amendatory thereof, for examination, by virtue of a warrant issued by me, upon the complaint of Frank Hitchcock made before me in writing, on oath, charging the said Millard C. Curtis with violation of the banking laws of the United States, to wit, section 5209 of the Revised Statutes, in being cashier, assistant cashier and agent of a certain banking association organized under the laws of the United States, and embezzling and misapplying certain of the moneys of said association, with intent to defraud said association; and whereas, on such examination, it appears to me that there is probable cause to believe the said Millard C. Curtis guilty of the said offense, and I have directed him to enter in recognizance with sufficient surety in the penalty of ten thousand dollars, for his appearance for trial on said charge at the March term of the district court of the United States for the western district of Missouri, western division, or, in default thereof, that he be committed to the jail of Cook county, in said district.

And whereas, the said Millard C. Curtis has not offered such recognizance, you, the said marshal, are hereby commanded that you convey the said Millard C. Curtis to the jail of the county of Cook; and you, the said keeper of the said jail, are hereby commanded that you receive the said Millard C. Curtis into said jail and him there safely and securely keep until he be discharged therefrom by due course of law.

In witness whereof, I have hereunto set my hand and seal, at Chicago, in said district, this 22nd day of September, 1892,
[SEAL.] and of the Independence of the United States the 117th year.

PHILIP A. HOYNE,
U. S. Commissioner, Northern District of Illinois.

Defendants at the time objected to the introduction of the foregoing order of removal for the reason that the same was indefinite in that it simply commanded the marshal of the northern district of *of* Illinois to remove Curtis to the western district of Missouri, and for the reason that the same did not appear to have been filed with the clerk of the U. S. district court of Kansas City, and for the further reason that the same was issued by W. Q. Gresham, a circuit judge, and not the judge of the district, as required by the act of Congress. Which objections were by the court overruled, and said ruling at the time was duly excepted to by defendants.

34 THOMAS MCGUIRE, on behalf of defendants, testified as follows:

I was deputy county marshal and keeper of the county jail of Jackson county, Missouri, September 24th to September 26th, inclusive, A. D. 1892; Millard C. Custis was in my custody in the county jail at Kansas City, Missouri, on those days; we held him under the commitment dated September 24th, A. D. 1892, issued by John

M. Nuckols, clerk of the district court for the western division of the western district of Missouri; he was turned over to us with this commitment on September 24th, 1892; we never had any other process for his detention; no copy of the order or warrant or removal of M. C. Curtis from Chicago to the western district of Missouri, issued by Judge W. Q. Gresham, was ever delivered or shown to me or the marshal of Jackson county.

HENRY WOLLMAN, on behalf of the plaintiff, testified as follows:

Mr. Morrow and myself were attorneys for Curtis, and we applied to Judge Philips in chambers, on the 24th day of Sept., 1892, to reduce the amount of bail required for Curtis by the U. S. commissioner, and we gave the district at-orney notice of the application: we went to see the judge, and then went to the office of the district attorney to notify him of the application; this was late in the evening, and while we were in the office of the district attorney the judge came in; he was preparing to leave the building to go to his home; we then requested him to hear our application, and the district attorney being present, it was agreed to hear the application informally; the amount of bail was then, after some argument, reduced by the judge to $3,000; we expected to be able to get the bond at once, but thought it might be possible that we could not get the bond until some time later; we requested the judge to make an order for the clerk of the court to take the acknowledgment of the bond so that we could secure the release of Curtis in the absence of the judge; the judge then made an order authorizing the clerk to take the acknowledgment of the bond; this order was in writing and delivered to us as the attorneys of Curtis; we gave this order to the clerk; we did not get the bond on that day; on the 26th day of Sept., 1892, we went to the office of the clerk of the district court and gave bond, which was acknowledged before Mr. Nuckols, the clerk; the judge was not in the building; court was not in session; Curtis and his attorneys made no objection to the taking of the bond in this way; it was taken in this way by our solicitation; we did not make any objection to the imprisonment of Curtis, nor did he, to our knowledge; Curtis was not taken before Judge Philips under a *habeas corpus* proceeding; the application made by us for bail was oral.

The defendants at the time objected to the foregoing evidence of the witness Wollman, for the reason that oral evidence was illegal and incompetent in a *scire facias* proceeding on a forfeited recognizance in this State.

Which objection the court overruled, and at the time the defendants duly excepted to said ruling.

J. P. TRACEY, on behalf of the plaintiff, testified as follows:

I am dep. U. S. marshal for the western district of Missouri. Curtis was delivered to the marshal by Mr. Charles, dep. U. S. M. of the northern district of Ill., on the 24th day of Sept., 1892. I received the prisoner for the marshal of this district, and gave the

receipt to the deputy bringing him here, and gave the receipt on the order of removal.

The defendants at the time objected to the foregoing evidence of the witness Tracey; which objection was by the court overruled, and said ruling at the time was duly excepted to by defendants.

At the conclusion of the taking of the testimony on behalf of plaintiff, defendants moved the court to exclude all the foregoing testimony of the witnesses, Charles Peabody, John M. Nuckols, H. E. Charles, Henry Wollman and J. P. Tracey, on the ground that oral evidence was illegal and incompetent in a *scire facias* proceeding on a forfeited recognizance in this State; which motion was by the court overruled, and at the time duly excepted to by defendants.

At the time this cause was submitted to the court, and in due time, the defendants requested the court to give the following declaration of law, to wit: "The court declares the law to be, that upon the pleadings and evidence in this case the finding and judgment must be for the defendants, Ward and Hunt." The court refused to give said declaration of law, and to the action of the court in refusing to give the same, the defendants at the time excepted and still except.

The foregoing was all the evidence offered.

That all of the foregoing may appear of record, the defendants tender this, their bill of exceptions, to the judge of said court, which is by him signed, sealed and ordered filed and made part of the record in said cause, this 15th day of July, 1893.

JNO. F. PHILIPS, [SEAL.]
District Judge.

O K: G. A. NEAL.
O K: HUGH C. WARD.

36 And on the 3rd day of July, 1893, assignment of errors was filed. Said assignment of errors is in words and figures, to wit:

Petition for Writ of Error.

In the District Court of the United States for the Western Division of the Western District of Missouri.

THE UNITED STATES, Plaintiff,
vs.
MILLARD C. CURTIS, ROBERT H. HUNT, and HUGH C. WARD, Defendants.

Now, this day, come defendants, Robert H. Hunt and Hugh C. Ward, and petition for writ of error, and attach hereto their assignment of errors.

R. H. FIELD,
Attorney for Defendants Hunt & Ward.

Assignment of Errors.

1. The court erred in admitting in evidence, over the objection of defendants, the order of removal issued September 23rd, 1892, by W. Q. Gresham, judge of the United States circuit court, to transfer M. C. Curtis from Chicago, Illinois, to the western district of Missouri.

2. The court erred in admit-ing, over the objection of defendants, parol evidence as to the disposition of defendant Curtis in Kansas City, Missouri, on September 24th, 1892, made by the deputy United States marshal for the northern district of Illinois.

3. The court erred in admitting, over the objection of defendants, parol evidence offered by plaintiff, that defendant Curtis and his attorneys, on September 24th, 1892, appeared before the judge of the United States district court at Kansas City, Missouri, at chambers, and asked that the amount of his bail be reduced by said judge.

4. The court erred in admitting over the objection of defendants parol evidence that the sufficiency and approval of the sureties on the recognizance in suit were referred to the clerk of the United States district court at Kansas City, Missouri, at the instance and with the consent of defendant Curtis and his attorneys.

5. The court erred in admitting over the objection of defendants parol evidence that the sureties were three times called before the forfeiture of the recognizance in suit was taken.

37 6. The court erred in admitting over the objection of defendants any and all the parol evidence offered by plaintiff in this cause.

7. The court erred in admitting in evidence the commitment of defendant, Curtis, dated and issued September 24th, 1892, by John M. Nuckols, clerk of the United States district court at Kansas City, to the United States marshal of the western district of Missouri.

8. The court erred in admitting in evidence over the objection of defendants the recognizance in suit.

9. The court erred in refusing to give the following declaration of law requested by defendants, to wit: "The court declares the law to be that upon the pleadings and evidence in this case, the finding and judgment must be for the defendants, Ward and Hunt."

10. The court erred in rendering judgment for the plaintiff against the defendants, Ward and Hunt.

11. The court erred in not rendering judgment for these defendants and against the plaintiff.

And on July 3rd, 1893, bond for appeal was filed; said bond is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, *set:*

Know all men by these presents, that we, Robert H. Hunt, Hugh C. Ward, Seth E. Wood and E. A. Phillips, are held and firmly bound unto the United States in the full and just sum of six thou-

sand dollars, to be paid to the said United States, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this third day of July, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas, lately at the April term of the district court of the United States for the western division of the western district of Missouri, in a suit depending in said court between The United States, plaintiff, and Millard C. Curtis, Robert H. Hunt and Hugh C. Ward, defendants, judgment was rendered against the said defendants and the said Hunt and Ward have obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States citing and admonishing —— —— to be and appear in the United States circuit
38 court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation;

Now, the condition of the above obligation is such, that if the said defendants, Hunt and Ward, shall prosecute said writ of error to effect and answer all damages and costs if they shall fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

Signed and sealed in presence of—

ROBERT H. HUNT. [SEAL.]
HUGH C. WARD. [SEAL.]
SETH E. WOOD. [SEAL.]
E. A. PHILLIPS. [SEAL.]

The above bond is hereby approved and ordered to be filed and made a part of the record.

JNO. F. PHILIPS, *Judge.*

UNITED STATES OF AMERICA, }
Western District of Missouri, } ss:

E. A. Phillips, obligor in the within bond, being duly sworn, on his oath deposes and says that he resides as stated therein, and is worth, over and above all his debts and liabilities, the sum of ten thousand dollars; and that he owns real estate to that amount, subject to execution, in the State of Missouri.

E. A. PHILLIPS.

Subscribed and sworn to before me, this fifth day of July, A. D. 1893.

DAVID F. BOYD,
Notary Public.

Com. expires April 7th, 1897.

And afterwards, at the same term of court and on the 3rd day of July, 1893, opinion of court was filed. Said opinion is in words and figures as follows, to wit:

On Forfeiture Recognizance.

In the District Court of the United States for the Western Division of the Western District of Missouri.

THE UNITED STATES
vs.
MILLARD C. CURTIS, ROBERT H. HUNT, and HUGH C. WARD.

Opinion.

PHILIPS, *J.:*

I have not had the time to set out in full the reasons which lead to the conclusions reached in this case. As doubtless the
39 cause will finally be presented before the appellate court I shall content myself with a summary of what I hold.

The defendant, Curtis, being in legal custody in a Federal district in Illinois, charged with a criminal offence committed in this jurisdiction, he was removable hither under section 1014, R. S. U. S. The evidence shows that Judge Gresham, U. S. circuit judge, for the Illinois district, was holding court at the time of the removal. As he would have had jurisdiction, as such judge, to try the defendant for the offence, had it been committed in that district, he was authorized to make the order or transfer.

When the prisoner was brought into this district, under proper process, to wit, the order of transfer, by the deputy U. S. marshal, and was by him turned over to the U. S. marshal of this district, the prisoner was lawfully within this district, and, *eo instanti*, became liable to the jurisdiction of the proper officers of this district. He was rightfully turned over to the jailor, and rightfully in his custody. The omission of the marshal, who brought the prisoner from Illinois, to deliver to the jailor a copy of the mandate, did not invalidate the jailor's custody. That was an act to be performed by the marshal after the delivery of the prisoner, and the copy in the hands of the jailor would have been mere evidence of his right to hold the prisoner on question of his right to custody being properly raised.

The omission of the marshal making the transfer to perform his duty, by leaving the original order of transfer with the clerk of the court here, for the same reason did not take away the jurisdiction of the U. S. officers here over the prisoner. When he was brought into this jurisdiction on proper process, jurisdiction at once attached here. The mere failure of the ministerial officer to leave the mandate, on which he transferred the prisoner could not oust a jurisdiction already contained. It was a ministerial act to be performed by him after the custody of the prisoner began here. On application for discharge under the *habeas corpus* act, on the ground of his illegal restraint, such mandate might have been necessary as evidence of the authority by which he was held. But when the prisoner made his parol application to have his bond reduced, in order that he might obtain his freedom, he admitted the legality of his

restraint, and the power and right of the district judge to admit him to bail.

The application was made to the judge of the district for reduction of bail. It is true this application was not in writing; nor, indeed, was it necessary that it should be. The U. S. district judge in such matter, proceeds just as a State officer, having jurisdiction, would proceed. Had such application been made to a State circuit judge, in a State case, the judge could have fixed the amount of bail, and directed the clerk to approve the bond. Such State judge has this authority, whether sitting in court or at chambers. It is an authority which adheres to his office.

I further hold, that when the prisoner, thereafter, gave bond he waived any irregularity in the acts of the ministerial officers anterior thereto. He obtained his liberty thereby, and he and his sureties knew that such was the effect of giving the bond; and I hold that every consideration of the public interest demands that he and the sureties should be estopped thereafter from disputing the validity of the instrument by which they obtained the discharge of the prisoner from jail, and enabled him to escape trial, and, possibly, punishment.

The mere fact that the forfeiture may have been taken under one of the numbered cases instead of another number is immaterial, as the condition of the bond was that the defendant should not depart without leave of court. The very object of this general saving clause is to bind the defendant to appear to any indictment that may be preferred against him.

There is no substantial variance between the recitations of the judgment of forfeiture and those of the bond. The record shows that the forfeiture was not taken until after the time specified in the bond. *De minimus lex non curat.*

The general direction of the order of transfer to deliver the prisoner in the western district of Missouri was sufficient. Had he been delivered in any other division of the district he would have been lawfully within the jurisdiction of the district. When indicted, he could, by mere order of the court, have been taken from one division to the other for trial. The functions of the district judge extend to the whole district, the venue goes to the particular division in which the offence was committed.

In answer to the general objection, that inasmuch as the record must show the jurisdictional facts on which the judgment of forfeiture was rendered, and that at the time of the forfeiture in this case there was nothing in the clerk's office of the court to show how the prisoner came here, it is sufficient to say, that no matter whether the order of transfer was filed with the clerk of this court, at the proper time, that order constitutes a part of the record in the proceedings leading to the prisoner's transfer. That order is in existance, and is now in evidence, and for the purposes of this case possesses the same virtue as if it had been destroyed wantonly or by accident just after the surrender of the prisoner. Proof could by parol have been made of its existence at the time of the delivery of the prisoner to the marshal or jailor here;

and the original record, the order itself, is in evidence, and is now on file here.

On all these questions see the following authorities:

State *vs.* Rabdolph, 22 Mo., 474; U. S. *vs.* Brawner, 7 Fed. Rep., 86; State *vs.* McElhaney, 20 Mo. App., 584; State *vs.* Poston, 63 Mo., 521; People *vs.* Blankman, 17 Wend., 252; U. S. *vs.* Evans, 2 Fed. Rep., 147; Mishler *vs.* Commonwealth (Pa.), I. Amer. Rep., 377; State *vs.* Mills, 69 Mo., 360; Bishop Cr. Pr., vol. I, sec. 118; Jones *vs.* Gordon, 82 Ga., 570; U. S. *vs.* Wallace, 46 Fed. Rep., 569; State *vs.* Peyton, 32 M. A., 522; Rev. Stat. Mo., secs. 4124, 4125, 5385, 5386.

Judgment for plaintiff.

JNO. F. PHILIPS, *Judge.*

UNITED STATES OF AMERICA, *sct:*

In the District Court of the United States for the Western Division of the Western District of Missouri.

I, John M. Nuckols, clerk of the United States district court, do hereby certify that the above and foregoing is a true copy of the record, bill of exceptions, assignment of error, and all proceedings in the case as fully as the same remains of record and on file in my office.

Seal of the United States District Court, Western Division, Western District of Missouri.

Witness my hand as clerk and the seal of said court hereto affixed. Done at office in Kansas City, Mo., this 25th day of July, 1893.

JOHN M. NUCKOLS, *Clerk.*

Filed Aug. 8, 1893.

JOHN D. JORDAN, *Clerk.*

42 *Appearance for Plaintiffs in Error.*

And on the eighth day of August, A. D. 1893, an appearance of counsel for plaintiffs in error was filed in the clerk's office of said circuit court of appeals in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1893.

ROBERT H. HUNT *et al.*, Plaintiffs in Error,
vs.
THE UNITED STATES. } No. 335.

The clerk will enter my appearance as counsel for the plaintiffs in error.

FRANK HAGERMAN.

Endorsed: U. S. circuit court of appeals, eighth circuit, December term, 1893. No. 335. Robert H. Hunt *et al.*, plaintiffs in error, *vs.* The United States. Appearance. Filed Aug. 8, 1893. John D. Jordan, clerk. Frank Hagerman, counsel for pl'ffs in error.

Appearance for Plaintiffs in Error.

And on the third day of November, A. D. 1893, certain other appearance of counsel for plaintiffs in error was filed in the clerk's office of said circuit court of appeals in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1893.

ROBERT H. HUNT *et al.*, Plaintiffs in Error,
vs.
THE UNITED STATES. } No. 335.

The clerk will enter my appearance as counsel for the plaintiffs in error.

HUGH C. WARD.

Endorsed: U. S. circuit court of appeals, eighth circuit, December term, 1893. No. 335. Robert H. Hunt *et al.*, pl'ffs in error, *vs.* The United States. Appearance. Filed Nov. 3, 1893. John D. Jordan, clerk. Hugh C. Ward, counsel for pl'ffs in error.

43 *Appearance for Defendant in Error.*

And on the tenth day of November, A. D. 1893, an appearance of counsel for defendant in error was filed in the clerk's office of said circuit court of appeals in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1893.

ROBERT H. HUNT *et al.*, Plaintiffs in Error,
vs.
THE UNITED STATES. } No. 335.

The clerk will enter my appearance as counsel for the defendant in error.

GEO. A. NEAL,
U. S. Attorney.

Endorsed: U. S. circuit court of appeals, eighth circuit, December term, 1893. No. 335. Robert H. Hunt *et al.*, pl'ffs in error, *vs.* The United States. Appearance. Filed Nov. 10, 1893. John D. Jordan, clerk. George A. Neal, U. S. attorney, counsel for def't in error.

Argument Commenced.

And on the 27th day of February, A. D. 1894, in the record of the proceedings of said circuit court of appeals is an entry in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1893.

TUESDAY, *February* 27, 1894.

ROBERT H. HUNT *et al.*, Plaintiffs in Error,
vs.
THE UNITED STATES, Defendant in Error. } No. 335.

In error to the district court of the United States for the western district of Missouri.

This cause having been passed and called for hearing this day, argument was commenced by Mr. Hugh C. Ward in behalf
44 of plaintiffs in error, and, the hour of adjournment having arrived, further argument was postponed until tomorrow morning.

Cause Submitted.

And on the twenty-eighth day of February, A. D. 1894, in the record of the proceedings of said circuit court of appeals is an entry of submission of said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1893.

WEDNESDAY, *February* 28, 1894.

ROBERT H. HUNT and HUGH C. WARD, Plaintiffs in Error,
vs.
THE UNITED STATES, Defendant in Error. } No. 335.

In error to the district court of the United States for the western district of Missouri.

This cause having been called this day for further hearing, argument was continued by Mr. Hugh C. Ward in behalf of plaintiffs in error and by Mr. George A. Neal in behalf of defendant in error and concluded by Mr. Hugh C. Ward for plaintiffs in error. Thereupon this cause was submitted to the court upon the transcript of the record from said district court and the briefs of counsel filed herein.

Opinion.

And on the seventh day of May, A. D. 1894, an opinion of the said United States circuit court of appeals was filed in said cause in the following words, to wit:

45 United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1894.

ROBERT H. HUNT and HUGH C. WARD, Plaintiffs in Error, *vs.* THE UNITED STATES, Defendant in Error.	No. 335. In Error to the District Court of the United States for the Western District of Missouri.

Mr. Hugh C. Ward (Mr. Richard H. Field was with him on brief), for the plaintiffs in error.

Mr. C. A. Neal, U. S. district attorney for the western district of Missouri, for the defendant in error.

Before Caldwell and Sanborn, circuit judges, and Thayer, district judge.

THAYER, district judge, delivered the opinion of the court:

The judgment that is involved in this case was rendered in a proceeding by *scire facias* to enforce a forfeited recognizance. The record shows that on September 20, 1892, an affidavit was filed before L. E. Wyne, United States commissioner for the western district of Missouri, which charged in substance and in legal effect that one Millard C. Curtis, who was the assistant cashier of the American National Bank of Kansas City, Missouri, had theretofore embezzled certain moneys of said bank and had made certain false entries in its books of account. A warrant was issued by the commissioner addressed to the United States marshal for the western district of Missouri for the arrest of said Curtis, which warrant was returned by the marshal unexecuted on the day that it was issued, to wit, September 20, 1892, because the accused could not be found in his district. Thereafter on September 22, 1892, a similar affidavit was filed with P. A. Hoyne, United States commissioner for the northern
46 district of Illinois, charging said Curtis with embezzling certain funds of the aforesaid bank, at Jackson county, Missouri, within the western district of Missouri on the 2nd day of June, 1892. On this affidavit a warrant was issued against Curtis, by Commissioner Hoyne, on September 22, 1892, under which the accused was arrested on the same day, in the city of Chicago, and taken before the commissioner. On a hearing had the commissioner found probable cause for the arrest to exist, and the accused was ordered to give bail in the sum of ten thousand dollars ($10,000) for his appearance before the district court of the United States for the western district of Missouri at the succeeding March term, 1893, of said court, or in default of giving such bail, to be committed to the jail of Cook county, Illinois. Curtis having failed to furnish bail, as required, he was removed to the western district of Missouri on the 23rd day of September, 1892, under a warrant signed by the Honorable Walter Q. Gresham, circuit judge, and he was there delivered into the custody of the United States marshal for the western district of Missouri, who committed him to the county jail of Jackson county, Missouri. Afterwards, to wit, on September 24, 1892,

on an application made in behalf of the accused to have his bail reduced, the bail originally fixed by Commissioner Hoyne at ten thousand dollars, was reduced to the sum of three thousand dollars by an order made by the Honorable John F. Philips, United States district judge for the western district of Missouri. On the same day a recognizance in the sum last stated was entered into by R. H. Hunt and Hugh C. Ward, the plaintiffs in error, as sureties for said Curtis, by virtue of which he was forthwith released from imprisonment. At the next regular term of the United States district court for the western district of Missouri held at Kansas City, to which term Curtis had been recognized to appear, indictments were duly found and returned against him, charging him with making false entries in the books of the American National Bank of Kansas City, and with embezzling and misapplying its funds while in his charge as assistant cashier. The accused failed to respond when called to answer the said indictments, whereupon the recognizance heretofore mentioned was declared forfeited and a writ of *scire facias* was directed to be issued against the sureties. The writ was duly served upon the plaintiffs in error, who afterwards appeared and answered the writ, interposing several defenses thereto. The case was tried before the court and the United States obtained a judgment for the sum stated in the recognizance.

It is insisted by the plaintiffs in error that the district court erred in admitting certain oral testimony, which was offered at the trial, and the rule is invoked in support of this contention that in proceedings by *scire facias* such testimony is not admissible. We do not dispute the existence nor the binding force of the rule last stated. A writ of *scire facias* when issued should only recite facts
that are disclosed by the record and files of the court
47 from which the writ emanates. Therefore when the defendants named in a writ of *scire facias*, by way of defense thereto, deny any of its recitals, it is incumbent on the plaintiff to verify the same by producing the records and files, and the facts in question cannot be otherwise proven, unless the record and files have been lost or destroyed. The rule itself is but another mode of stating the familiar rule of evidence, that matters of record cannot be proven by parol. State of Vermont *v.* Merrill, 14 Vt., 64; People *v.* Kane, 4 Denio, 535; Nenosha R. R. Co. *v.* Sperry, 3 Biss., 311. But in a proceeding by *scire facias* if the appropriate record and files are produced, which establish all of the essential recitals contained in the writ, the judgment should not be reversed on appeal merely because the trial court permitted oral evidence to be introduced which was merely corroborative of facts already sufficiently proven by the record. An error of that kind is clearly immaterial and will not warrant a reversal of the judgment. Stephens *v.* Crawford, 44 American Decisions, 680, 682, 683; *id.*, 1 Ga., 574. All of the oral testimony to which the defendants in the present case interposed an objection, save a certain class of oral testimony that will be referred to hereafter, was testimony that simply tended to show facts which were sufficiently disclosed by the record. For example, the testimony of the court crier tending to show that the parties to the

recognizance had been duly called prior to the forfeiture, was not prejudicial, because the record entry that the "said Millard C. Curtis, although solemnly called to come into court in discharge of said recognizance, comes not, but makes default," was a sufficient entry of record to support the forfeiture without the aid of parol testimony. The same remark may be made with respect to the testimony of the clerk of the district court, which tended to show that the recognizance had been acknowledged before him by virtue of a written order of the district judge; also the same remark may be made with respect to the testimony of the deputy marshal of the northern district of Illinois, which tended to show the manner in which he had executed the warrant of removal. All of the material facts testified to by these witnesses, were clearly established by the records of the court, or by papers produced at the trial, which properly belonged to and formed a part of the court records and files. No error was committed in the admission of this testimony, which would justify a reversal, although it may have been incompetent.

In this connection it is proper to add that we can attach no importance to the contention of counsel that the transcript of the proceedings before Commissioner Hoyne ought not to be considered in determining the question of the liability of the sureties, because, as it is said, the transcript was not returned to and filed in the office of the clerk of the United States district court for the western district of Missouri. With reference to the latter contention it is sufficient to say, that the transcript, when produced on the trial and
48 read in evidence, was not objected to by the sureties and no exception was saved to its introduction. Furthermore, there is nothing in the record to show that it had not been filed with the clerk of the United States district court for the western district of Missouri before it was produced and offered in evidence. As it was the duty of the commissioner before whom Curtis was examined and held, to file a transcript of his proceedings with the clerk of the United States district court for the western district of Missouri, it must be presumed in the absence of any evidence to the contrary, that this duty had been discharged, that the transcript was produced from the proper custody and formed a part of the court files.

It is further assigned for error that the warrant of removal was improperly admitted in evidence for the reason that it was not signed by the United States district judge for the northern district of Illinois, and was, therefore, void. We entertain the view that it is wholly immaterial to the decision of this case whether the warrant of removal was or was not signed by the proper judicial officer. The accused did not see fit to raise that question after he was removed to the western district of Missouri, but waived all objections to the process by which the removal had been accomplished, by voluntarily appearing before the district judge of that district and asking to have the bail fixed by Commissioner Hoyne reduced, and by subsequently tendering bail for the reduced amount, which was accepted, and by means of which he obtained his discharge. Neither the accused nor the sureties upon his bond are in a position to question the validity of the warrant of removal after admitting

by the acts aforesaid that the accused was under a lawful obligation to give bail, and that they did not choose to question the mode of his removal. The conduct of the principal and the sureties in the recognizance estops them in this proceeding from impeaching the warrant of removal. Peck, *et al.*, *v.* The State, 63 Ala., 201; Stever *v.* Sornberger, 24 Wend., 275; Springfield Card Manuf'g Co. *v.* West, 1 Cushing, 388; Littleton *v.* State, 46 Ark., 413, 417. We think that it makes no difference, so far as the present case is concerned, by what means the removal from the northern district of Illinois to the western district of Missouri was accomplished, or whether the warrant of removal was valid or otherwise. The validity of the recognizance is in nowise dependent upon the latter question. The accused had been lawfully ordered by the United States commissioner to give bail for his appearance before the United States district court for the western district of Missouri, or in default thereof, to stand committed to jail. By reason of his having been so lawfully ordered to give bail, it follows, we think, that if he had sued out a writ of *habeas corpus* after his removal, to obtain his discharge, based upon the ground that the warrant of removal was void, it would have been the duty of the court or judge before whom he was brought by such writ, to have ordered his commitment to jail to await the action of a grand jury, if he
49 failed at that time to give a bond for his appearance, even though such court or judge might have been of the opinion that the warrant of removal was void. The result is that no prejudicial error was committed against the sureties in admitting the warrant of removal even though it was void. For the wrong done to the prisoner, if any, in removing him under illegal process, he must seek a remedy in some other proceeding. The alleged trespass will not avail the prisoner or his sureties as a defense to this proceeding.

This brings us to the consideration of the last and most important question presented by the record, namely, whether the recognizance in suit is void because it purports to have been signed and acknowledged before the clerk of the United States district court for the western district of Missouri, instead of being acknowledged before the district judge? Among the papers produced at the trial which formed a part of the files in the clerk's office was the following order signed by the district judge: "John M. Nuckols, U. S. district clerk. In the matter of the United States *v.* M. C. Curtis, you may approve recognizance for him in the sum of three thousand dollars, with two sureties in addition to the principal, the same to be sufficient and approved by you. John F. Philips, judge." The recognizance also bore the following endorsement, "Taken and acknowledged before me on the day and year first above written. John M. Nuckols, clerk of the U. S. district court. Done by order of the Honorable John F. Philips, judge of the United States district court for the western district of Missouri hereto attached." It was proven by oral testimony, which was objected to, that at a late hour of the day on which the recognizance bears date, to wit: September 24, 1892, the accused being then in custody at Kansas City,

an application was made to the district judge by his attorney to reduce his bail; that this application was duly heard by the district judge in the presence of the attorney for the accused, also in the presence of the district attorney, and that the bail was reduced and fixed at the sum of three thousand dollars. Thereupon, as the hour was late, and as the sureties could not be produced immediately, the prisoner's attorney requested the district judge to make the aforesaid order, permitting the bond to be executed before the clerk, his object being to secure the speedy release of his client and prevent his detention in prison over night. It will be observed, therefore, that the record and files show that the prisoner had been lawfully charged with an offense against the laws of the United States; that he had been legally arrested therefor, examined, and ordered to give bail, and that the bail as originally fixed had been reduced by an order made by the district judge. In addition to these facts there is oral proof that the bail bond was signed before the clerk, at the prisoner's request, to secure his speedy release. Assuming for the purpose of this decision that the recognizance in question was in legal effect taken by the clerk of the district court, and that there
50 was no statute, State or Federal, then in force authorizing the clerk to take bail in criminal cases, the question arises whether under the facts aforesaid, either the accused or his sureties can be heard to allege that the recognizance is void, because it was not taken by the proper officer? In the case of Jones *v.* Gordon, governor, 82 Ga., 570, the accused was arrested in a county different from that in which the offense was committed and was taken before a justice of the peace for the county where the arrest was made, who had no jurisdiction of the case and no authority to take bail therein. Before such justice the accused gave bail, with sureties, for his appearance before the superior court of the county where the offense was committed. It was conceded that the magistrate before whom the proceedings were had, had no jurisdiction of the case or authority to take bail, nevertheless, it was held that as the recognizance was given voluntarily and was effectual to secure the prisoner's release from imprisonment, it was supported by a sufficient consideration and might be enforced against the sureties. The court said in substance that the accused had the right to waive a legal trial and the right to waive the disqualification of the justice to take bail, and that he had done so in effect by giving bail for his appearance before a court that had jurisdiction of the offense. In the case of Weldon *v.* Colquitt, governor, 62 Ga., 449, where a person who had been arrested on Sunday, insisted upon an immediate hearing before a magistrate on that day and was held to bail, and forthwith entered into a recognizance and by that means secured his release from arrest, it was held that the recognizance might be enforced by a writ of *scire facias*, although it was executed on Sunday, and although the magistrate had no right to conduct an examination on that day and although his order of commitment was for that reason void. So in the case of Littleton *v.* State, 46 Ark., 413, it was held that a recognizance might be enforced against the sureties therein, although the sheriff before whom it was taken had executed the warrant of

arrest in a county where he had no authority to execute it. It is also a well-established doctrine that where a bond is given in the course of a judicial proceeding, such as a bond to secure the release of attached property, or a forthcoming bond, the sureties are estopped by the execution of the obligation from afterwards asserting that no levy had been made, or that the property was not subject to attachment, or that the bond was invalid for other reasons of a like character. Haggart *v.* Morgan, 55 American Decisions, 350, *id.*, 1 Selden, 422; Portis *v.* Parker, 58 American Decisions, 95; Kincannon *v.* Carroll, 30 American Decisions, 391; Bostwick *v.* Goetzel, 57 N. Y., 584. See also United States *v.* Wallace, 46 Fed. Rep., 569. We think that the principle maintained by the foregoing cases is sound and should be applied in the case at bar. We can conceive of no sufficient reason why the sureties should be permitted to question the validity of the recognizance, on the ground that it was acknowledged before the clerk, when it was
51 so acknowledged at the request of the accused and for the purpose of securing his immediate release, and when it was effectual for that purpose. We know of no reason why it was not competent for the accused to waive the formality of an acknowledgement of the bond and an examination of the sureties before the district judge, and having obtained his discharge by means of such a waiver, we know of no reason why he and his sureties should not be estopped from questioning the validity of the bond on that ground. In our judgment the case is one in which the wholesome doctrine of estoppel may be properly invoked and applied. The course pursued in taking bail was adopted at the solicitation of the accused and for his advantage. The bond taken was accepted as sufficient by the district judge and the accused was forthwith released. The contract made by the principal and his sureties was voluntary; it also rested upon an adequate consideration, to wit: the release of the accused from imprisonment. Under these circumstances it would be trifling with the administration of justice to hold that the recognizance was invalid, because it was signed and acknowledged before the clerk. We accordingly hold that the testimony which showed that the recognizance was acknowledged before the clerk, at the request of the accused, was properly admitted. It did not tend to contradict any of the recitals contained in the record or in the writ of *scire facias*, and was not inadmissible on that ground. We furthermore hold that the sureties are estopped from questioning the validity of the bond upon the ground that it was entered into before the clerk, and so holding, the judgment of the circuit court is hereby affirmed.

Filed May 7, 1894.

52 *Judgment.*

And on the seventh day of May, A. D. 1894, in the record of the proceedings of said circuit court of appeals, is a judgment in said cause in words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1894.

ROBERT H. HUNT and HUGH C. WARD, Plaintiffs in Error,
vs.
THE UNITED STATES, Defendant in Error. } No. 335.

In error to the district court of the United States for the western district of Missouri.

This cause came on to be heard on the transcript of record from the district court of the United States for the western district of Missouri and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be, and the same is hereby, affirmed without costs to either party in this court.

May 7, 1894.

Petition for Rehearing.

And on the twenty-fifth day of June, A. D. 1894, a petition for rehearing was filed in the clerk's office of said circuit court of appeals in words and figures following, to wit:

53 In the United States Circuit Court of Appeals, Eighth Circuit, May Term, 1894.

ROBERT H. HUNT *et al.*, Plaintiffs in Error,
v.
THE UNITED STATES, Defendant in Error.

In error to the district court of the United States for the western district of Missouri.

Petition for Rehearing.

Now come plaintiffs in error and respectfully petition the court to grant a rehearing in this cause for the reason that the opinion filed herein is illogical, contrary to law, and cannot be sustained either upon principle or authority.

54 We file this petition for a rehearing because we honestly and firmly believe that if the court will reconsider the case at bar in the light of the authorities which we shall hereinafter cite, it will see that a most glaring and palpable error has been committed in the decision of this case and will gladly and willingly correct the same. And in praying the court to review one of its own decisions, we feel that we are but asking it to exercise its highest judicial function. Besides, if error has been committed in affirming the judgment of the trial court, it is but fair to this court that it should have an opportunity to correct the same, thereby making unnecessary a review of this case on writ of error, by the Supreme Court of the United States, as the plaintiffs in error, should this

court adhere to the opinion filed herein, will be entitled to the judgment of that court, the judgment of this court not being final.

It is conceded in the opinion that there was no statute, State or Federal, authorizing the clerk of the district court to take the recognizance in suit. In other words, that the clerk who took the recognizance, in doing so acted without authority of law. But it is said in the opinion that the plaintiffs in error are estopped from questioning the validity of the recognizance in suit, and the reasons therefor are given by the court in this language: "We can conceive of no sufficient reason why the sureties should be permitted to question the validity of the recognizance, on the ground that it was acknowledged before the clerk, when it was so acknowledged
55 at the request of the accused, and for the purpose of securing his immediate release, and when it was effectual for that purpose. We know of no reason why it was not competent for the accused to waive the formality of an acknowledgment of the bond and an examination of the sureties before the district judge, and having obtained his discharge by means of such a waiver, we know of no reason why he and his sureties should not be estopped from questioning the validity of the bond on that ground. In our judgment, the case is one in which the wholesome doctrine of estoppel may be properly invoked and applied. The course pursued in taking bail was adopted at the solicitation of the accused and for his advantage. The bond taken was accepted as sufficient by the district judge and the accused forthwith released. The contract made by the principal and his sureties was voluntary; it also rested upon an adequate consideration, to wit: the release of the accused from imprisonment. Under these circumstances it would be trifling with the administration of justice to hold that the recognizance was invalid, because it was signed and acknowledged before the clerk. We accordingly hold that the testimony which showed that the recognizance was acknowledged before the clerk, at the request of the accused, was properly admitted. It did not tend to contradict any of the recitals contained in the record or in the writ of *scire facias*, and was not inadmissible on that ground. We furthermore hold that the sureties are estopped from questioning the validity of the bond upon the ground that it was entered into before the clerk, and so holding, the judgment of the circuit court is hereby affirmed."

56 If the opinion in this case is allowed to stand, it will be an authority in support of the remarkable proposition, that a contract which is not voidable, but absolutely void, can be made valid and binding upon the parties thereto by the application of the principle of estoppel, a proposition which has not the support of a single authority.

It must be constantly borne in mind that this is a *scire facias* proceeding, directed to plaintiffs in error to show cause why execution should not issue against them on a recognizance. Now, what is a recognizance?

In State *v.* Randolph, 22 Mo., 484, a recognizance is defined as follows:

"It is, as we all know, an acknowledgment taken by some court or officer authorized by law to do so, of a debt due to the State, but suspended upon the condition that the accused appear in court at the appointed time and answer the alleged charge and do not depart without leave thereof. The essentials of such a recognizance, are that it be taken by a competent court or officer in a case existing before such authority, and for the performance of some act that the law allows to be secured in that way and in the form prescribed for that purpose."

Bouvier defines a recognizance as follows:

"It is an obligation of record entered into before a court or officer duly authorized for that purpose, with a condition to do some act required by law, which is therein specified."

57 Contracts of record are those which are evidenced by matter of record, such as judgments, recognizances and statutes staple. These are the highest class of contract. They are contracts entered into by the intervention of some public authority, and are witnessed by the highest kind of evidence, viz., matter of record.

1st Bouvier (15th ed.), p. 394.

All the authorities agree that a recognizance or bond must be taken before an officer duly authorized, and in its form and attending formalities it must conform to the statute and unwritten law of the State, or it will be void.

Bishop's Criminal Procedure, sec. 264, and cases cited; see also, State *v.* Randolph, 22 Mo. 480; State *v.* Randolph, 26 Mo. 216; State *v.* Morrow, 5 Kas. 341; Clink *v.* Muskegon Circuit Judge, 58 Mich. 244; Chinn *v.* Commonwealth, 5 J. J. Mar. 30, Frishe *v.* Commonwealth, 6 Dana, 318; Butler *et al. v.* Foster, 14 Ala. 323; Antonez *v.* State, 26 Ala. 81; Dickinson *v.* State, 20 Neb. 72; Commonwealth *v.* Canada, 13 Pick. 86; Commonwealth *v.* Roberts, 1 Duvall, 199; Jacquemine *v.* State, 48 Miss. 280; Commonwealth *v.* Otis, 16 Mass. 198; Commonwealth *v.* Loveridge, 11 Mass. 337; Blevin *v.* State, 31 Ark. 53.

There can be no question but that a recognizance taken by an officer not duly authorized by law to take the same, is absolutely void.

In Bishop on Contracts (enlarged edition), at sec. 611, it is said:

58 "A contract is void when it is without any legal effect; voidable when it has some effect, but is liable to be made void by one of the parties or a third person."

Bouvier defines void as follows:

"That which has no force or effect."

In Allis *v.* Billings, 6 Metcalf, 417, "void" is defined as follows:

"The term void, as applicable to conveyances or other agreements, has not at all times been used with technical precision, nor restricted to the peculiar and limited sense as contradistinguished from 'voidable,' it being frequently introduced, even by legal writers

and jurists, where the purpose is nothing further than to indicate that a contract was invalid and not binding in law. But the distinction between the terms 'void' and 'voidable,' in their application to contracts, is often one of great practical importance; and whenever entire technical accuracy is required, the term 'void' can only be properly applied to those contracts that are of no effect whatsoever; such are a mere nullity and incapable of confirmation or ratification."

Again, in Bishop on Contracts, at sec. 188, it is said:

"Obviously a void contract is the same as none, and a voidable one may be so treated."

In Clink *v.* Russell, 58 Mich. 242, it was held that a recognizance must be entered into before a court or officer duly authorized; therefore, where an instrument purporting to be a recognizance is entered into before an unauthorized officer, it is of no binding force whatever.

59 In Mattox *v.* Hightsue, 39 Ind. 95, it was held that the separate deed of plaintiff, a married woman, was void and passed no title to her lands, and that she was not estopped to assert such claim, as a party can never be estopped by an act that is illegal and void.

In Thomas *v.* Burrus, 23 Miss. 550, the probate court had appointed a guardian for a minor, and while such appointment was unrevoked, appointed another who gave a bond with a surety, reciting that he had been appointed guardian. In a suit on this bond against the surety it was held that the appointment of the last guardian was absolutely void, and that the surety might show the fact. The court said: "It is certainly true that where a party makes a distinct and clear recital of any fact in a deed or other valid obligation, he will be estopped from denying the truth of such recital. But this doctrine presupposes a valid legal obligation, and we do not know any authority, and reason is certainly against the proposition, that a party is estopped by any recital contained in an instrument, from showing that the instrument containing it is absolutely void. In this case the probate court had no power to appoint Walker guardian, and if the order of appointment was void, it had no power to take or accept the bond, and having no such power the acceptance was a void act, and could not fix any liability on Thomas."

"While this court will, in all cases, hold guardians and sureties to a strict performance of their trusts, it must at the same
60 time so administer the law as not to impose obligations and duties upon parties where none have been assumed according to law."

In Glidden *v.* Strupler, 52 Pa. St., 400, a married woman by agreement signed only by herself and without an acknowledgment, contracted to sell lands; she received one year's interest and a small part of the purchase-money. The purchaser took possession and made improvements with her knowledge and encouragement. Held, that inasmuch as contracts of married women are nullities,

neither the principle of estoppel nor compensation would prevent her recovering the land.

In that case, the court say, *inter alia*:

"The contract to convey being absolutely void because of incapacity, its ratification is equally forbidden unless by deed in the mode prescribed by the statute. No multiplication of deeds (and they are the most solemn acts *in pais* by which title can be transferred) will serve to ratify the void conveyance, unless made according to the statutory direction. Much less can express ratification by parol or expressions of satisfaction infuse life into that which has no vitality. How, then, is it possible mere acts can be more efficacious that merely indicate the intention to transfer, which the writing has already expressed in terms explicit and emphatic? Acquiescence in, or acknowledgment of the invalid act, cannot be invested with greater virtue or vigor than the deed itself by which the act was done. The policy of the law which denies the capacity to do the act, as clearly denies the capacity to confirm it except in the legal mode." * * * "No right can spring from a void and prohibited contract, and the defendants had none."

61

In Meriam *v.* R. R., 117 Mass., 241, it was said:

"The defendants insist that the claim of the plaintiff is inequitable, and that for that reason she is not entitled to the aid of a court of equity in its enforcement. But there is no equitable construction of a contract or duty, different from the legal one; and the same thing is true in the construction of statutes. 2 Story Eq. Jur. 1548. A court of equity has no more jurisdiction than a court of law to recognize and give effect to instruments which, by statute, are inoperative. Townsley *v.* Chapin, 12 Allen, 476."

If the recognizance in suit is void, as it certainly is, for want of authority in the clerk to take the same, we are now unable, as we have always been, to see on what principle plaintiffs in error can be held liable. The doctrine of estoppel certainly has no application, and in the very nature of things can have none. If the recognizance is void, it is without legal effect, has no binding force whatever, and it can't be made binding on any legal principle known to the law.

For another reason the plaintiffs in error are not estopped to question the validity of the recognizance. It is indisputable law that the State can't be estopped by the unauthorized acts of its officers. Pulaski *v.* State, 42 Ark. 118; Attorney General *v.* Marr, 55 Mich. 445; State *v.* Brewer, 64 Ala. 287.

62

In Bishop's Contracts (enlarged edition), at sec. 993, it is said:

"The Government is never estopped, as an individual or private corporation may be, on the ground that the agent is acting under apparent authority which is not real, the conclusive presumption that his powers are known making such consequence impossible."

If the Government is not estopped from denying the validity of the recognizance in suit because the clerk who took the same acted without authority of law, then certainly plaintiffs in error ought

not to be held estopped from so doing, for mutuality is an essential ingredient of estoppel.

In Bishop on Contracts (enlarged edition), sec. 368, it is said: "Estoppels must be mutual, both parties being bound or neither. A common illustration is where a married woman, under the common-law disabilities, or a minor, not having capacity to make a lease of lands, executes one by indenture; here the lessee will not be estopped by his covenants, because his lessor is not. But this case might well be put on the ground that the lease is void. Another, from the old books, not admitting of being explained away, is that 'if a man takes a lease for years of his own lands by patent from the King, rendering rent, this shall not estop the lessee, as an indenture between common persons in such a case would do, because the King cannot be estopped, * * * and if he be not estopped, neither shall the lessee, because all estoppels ought to be mutual.'"

63 The Government can act only through officers and agents, and the Government is bound only where there is an actual authorization. The clerk who took the recognizance in suit, we have seen, had no authority to take the same, and the recognizance in suit is therefore not binding on the Government. If not binding on the Government, both upon principle and authority, it is certainly not binding on plaintiffs in error.

In Reese *v.* United States, 9 Wall., 13, the court, speaking through Mr. Justice Field, said:

"By the recognizance, the principal is in theory of the law committed to the custody of the sureties as to jailers of his own choosing, not that he is in point of fact in their custody, at least subjected or can be subjected by them to constant imprisonment; but he is so far placed in their power that they may at any time arrest him upon the recognizance and surrender him to the court, and to the extent necessary to accomplish this, may restrain him of his liberty. This power of arrest can only be exercised within the territory of the United States, and there is an implied covenant on the part of the principal with his sureties, when he is admitted to bail that he will not depart out of this territory without their assent. There is also an implied covenant on the part of the Government when the recognizance of bail is accepted that it will not in any way interfere with this covenant between them, or impair its obligation, or take any proceedings with the principal which will increase the risk of the sureties or affect their remedy against them."

64 In Commonwealth *v.* Roberts, 1 Duvall, 199, it was held that a jailer had no authority to take bail, and a bail bond taken by him was not binding on the sureties, either as a statutory or common-law obligation.

In that case the court, *inter alia*, said:

"It is insisted that the delivery from prison of the defendant and the enjoyment of his liberty by reason of said bond, is a valid consideration and renders it obligatory. If the Commonwealth was precluded from a recapture and reimprisonment of the accused by reason of the bond, there would be great force in this argument;

but we apprehend such is not the case. Because the order of the circuit judge did not, in terms, direct who was to take the bond, therefore its legal import is, that when the prisoner shall execute such bond before the proper authorities he was to be discharged. But had it directed in terms the jailer to take such bond, still it would not have vested him with any authority to do so, nor authorized the discharge of the prisoner from confinement. In other words, the jailer, not being authorized by law to act in such case, could not bind the Commonwealth; and although he discharged the prisoner by reason of said bond, yet Roberts was subject every moment to a recapture and further imprisonment. Hence his discharge could be no valid consideration to uphold the bond. It is not within the province of courts to invest persons with authority to take bond and discharge prisoners from custody from whom the legislature have withheld such authority; nor should courts,
65 by recognizing such acts to be binding on either party, contravene the policy of the Commonwealth in designating by law the officers authorized to bind her. Not being bound by the acts of unauthorized persons, the State should not insist that the other party is bound, or that would destroy all mutuality."

Congress has not authorized clerks of Federal courts to take recognizances. Such authority has been withheld.

See sec. 1014 R. S. U. S. and original brief filed herein, pp. 54–66.

As said by the supreme court of Nebraska in Dickinson *v.* State, *supra*: "To hold that an unauthorized person may accept a recognizance running to the State, which will bind the person entering into it, is to hold that one private unauthorized person may make another the debtor of the State, a proposition illogical in theory and dangerous in practice."

The opinion of the court is squarely in conflict with Commonwealth *v.* Roberts, *supra*, and also with State *v.* Morrow, 5 Kas. 341; Clink *v.* Muskegon Circuit Judge, 58 Mich. 244; Chinn *v.* Commonwealth, 5 J. J. Mar. 30; Butler *et al. v.* Foster, 14 Ala. 323; Antonez *v.* State, 26 Ala. 81; Dickinson *v.* State, 20 Neb. 72, and Jacquemine *v.* State, 48 Miss. 280.

Commonwealth *v.* Roberts, *supra*, is a well-considered case; has never been criticised or overruled, and the reasoning thereof seems to us unanswerable.

Littleton *v.* State, 46 Ark. 413, so much relied on by coun-
66 sel for defendant in error in his brief, and cited in the opinion of the court as an authority, is not in point and really has no application to the case at bar. The facts of that case, as stated by the court, are these:

"Upon a warrant issued by a justice of the peace of Yell county for the arrest of William Easley for a misdemeanor committed in Yell, the sheriff of that county arrested the accused in Logan county and brought him back to Yell county and there took from the appellants a bail bond for the defendant's appearance before the justice at a day specified in the bond, and discharged him. The defendant failed to appear before the justice as required by the con-

dition of the bond, and the State brought this action by complaint and summons in the circuit court of Yell county against the bail. The bond was not signed by the defendant. The defenses to the action were: First—that the circuit court had no jurisdiction, the forfeiture of the bond being in the justice's court. Second—duress—that the arrest in Logan county by the sheriff of Yell, and his subsequent custody of the defendant in Yell, were illegal and the bond was void for duress."

It will thus be seen that no question was made as to the authority of the sheriff to bail prisoners and take recognizances. The legislature of Arkansas had conferred such authority on the sheriff. The point made was that Easley was not in legal custody of the sheriff of Yell county at the time the recognizance for his appearance was taken by the sheriff and for that reason the recognizance was void.

The court held that it was no defence to the action on the
67 recognizance against the bail, that the accused was illegally in custody at the time it was taken, and in doing so recognized in unmistakable terms, the principle that a recognizance taken by an officer without authority of law to take the same is absolutely void, the very principle for which we are contending. That case is really an authority against the validity of the recognizance in suit, for in the opinion the court say:

"We are aware that there are cases upon bail bonds in which the sureties have received the benefit of duress of the principal, but an examination will show that in most of them there was a fundamental defect in the proceedings which led to the arrest that in effect rendered it and the bond taken in pursuance of it void, as in Fisher *v.* Shattuck, 17 Pickering, 252, where the magistrate requiring the bond had no jurisdiction of the subject-matter, and hence no authority whatever. The same court in later cases, without inconsistency, refused to receive the plea of duress of the principal from a surety. Robinson *v.* Gould, 11 Cush. 55; Bowman *v.* Hiller, 130 Mass. 153."

"The case of Blevins *v.* State, 31 Ark. 53, is of the same class as Fisher *v.* Shattuck. There the sheriff of Pope county, under process issued to him from Pope, made an arrest and took bail in Conway county. The court held that in Conway county the sheriff of Pope had no official capacity, and that a bond taken there by him was no more than a bond executed by a private citizen, and was for that reason void."

68 In the case a- bar it is not claimed that the accused was in illegal custody at the time the recognizance was taken, and that the same is void for duress. There is no such question in the present case, and for this reason, Littleton *v.* State, *supra*, has no application. Our contention is, and has always been, that the recognizance is void because the clerk who took the same had no authority to let to bail, and Blevins *v.* State, 31 Ark. 53, cited in Littleton *v.* State, is an authority in support of our contention.

Jones *v.* Gordon, 82 Ga. 570, cited by the court in its opinion, has no application to the case at bar. The question in the present case

is one of authority of the clerk to let to bail. Our contention is that clerks of Federal courts have not been authorized to let to bail in any case or under any circumstances, and for this reason recognizances taken by them or entered into before them are absolutely void and of no binding force whatever. The validity of the recognizance in suit is questioned on this ground, and not, as in the Georgia case, on the ground that the officer who took the same had no jurisdiction. In the Georgia case, there was no question but that justices of the peace had authority to let to bail. The point made was, that as the bail bond was taken before a magistrate in a different county from that in which the crime was committed, the magistrate who took the bond from the defendant and his sureties, had no jurisdiction. The court held that inasmuch as the accused had voluntarily entered into the recognizance before a magistrate having authority to let to bail, thereby securing his release
69 from custody, and made no question at the time as to the jurisdiction of the magistrate, the validity of such recognizance could not afterwards be questioned on the ground that said magistrate had no jurisdiction. That case was decided upon the familiar principle that objection to the jurisdiction of a court must be made at the proper time, and that if a party voluntarily submits his person to the jurisdiction of a court, he will not be heard thereafter to object on that ground.

In State *v.* Wenzel, 77 Ind. 428, the point was made that the accused was in illegal custody at the time the recognizance in suit was taken by the circuit court. In disposing of this point the court, *inter alia*, said:

"We are not willing to hold that one against whom an accusation of felony has been formally and properly lodged, can voluntarily enter into a recognizance in a court of general jurisdiction, and afterwards escape the consequence of a default upon the ground that a ministerial officer had illegally arrested him. To hold with the appellee would be to adjudge that a court of competent jurisdiction must, in cases where a party in the custody of the sheriff comes in and asks to enter into a recognizance, before granting the request, stop and enquire by what manner the accused came into custody. We are clear that the court is not bound to do any such thing, but has a right to presume that the accused is properly within its jurisdiction. If the accused controverts the legality of the means by which he was brought into court, he must make known his objection, and not by affirmative act, submit to the
70 authority of the court and ask of it the privilege of giving bail. As the court possessed plenary jurisdiction of the subject-matter, and as the accused, voluntarily and without objection, submitted his person to the jurisdiction of the court, and, in acknowledgment of the authority, asked that his recognizance be accepted and made part of the record, it must be held that the jurisdiction of the court was in all respects complete and perfect."

"There is still another phase of the case. The accused was in person present in open court tendering his recognizance, and it then became necessary for the court to determine whether it had juris-

diction to receive the bail proffered. The question of jurisdiction was, therefore, one for determination, and, as it was determined, the correctness of that decision cannot be impeached in this collateral manner. It has been again and again decided that the judgment of an inferior court upon its own right to take jurisdiction cannot be collaterally questioned; and there is much stronger reason for applying the rule to courts of general superior jurisdiction."

The distinction between the case at bar and Jones *v.* Gordon, *supra*, is perfectly obvious. The release from custody of the accused was a sufficient consideration for the recognizance in that case, because the magistrate who took the recognizance had authority to let to bail, and therefore bound both the State and the bail in taking the recognizance. The magistrate being a judicial officer, in taking
the recognizance necessarily decided that he had jurisdic-
71 tion, and his right to take jurisdiction could not be collaterally questioned. See State *v.* Wenzel, *supra*.

Weldon *et al. v.* Colquitt (governor), 62 Ga., 449, was a *scire facias* proceeding to have execution on a recognizance. A *scire facias* was issued and served upon the bail. The bail pleaded to the *scire facias*, first, that the bond was illegal and void because made and delivered on the Sabbath day; and secondly, that both the judgment of the magistrate requiring the bond and the bond itself were illegal and void, because there was no necessity or other good reason for holding the court of enquiry on the Sabbath day, and the holding of the same was not a work of necessity or charity, but was an exercise of the ordinary business or calling of the magistrate.

The court held the order or judgment of the magistrate requiring bail void, because made on Sunday, but held the bond valid and binding upon the bail, and gave the reason for so holding in this language:

"The warrant and arrest were, however, legal. Taylor was in lawful custody, and was as effectually a prisoner and deprived of his liberty as if he had been in jail. Had he been in jail, he might have been legally delivered on bail, though it was Sunday. * * *" 55 Ga., 241.

"Though a void judgment be some part of the inducement to a contract, yet, if the contract would be valid and obligatory had no judgment been rendered, the contract is not made void by the nullity of the judgment."

In that case the court held the recognizance valid and
72 binding on the sureties because the magistrate who took the same had authority to let to bail on Sunday in the absence of a judgment requiring bail to be given. The release from custody was a sufficient consideration for the recognizance in that case, because the magistrate who took the recognizance had authority to take the same and in doing so bound both the State and the bail. Weldon *et al. v.* Colquitt (governor), *supra*, therefore has no application.

As to the other case cited by the court in its opinion it is sufficient to say that recognizances given in criminal cases were not involved therein, and that the questions raised therein were simply

irregularities in the proceedings. In the case at bar, the validity of the recognizance in suit is questioned because of a fundamental defect therein, viz: want of authority in the clerk to take the same.

The point that the release of the prisoner from custody is a sufficient consideration for the recognizance where the recognizance given is void for want of authority in the officer to take the same, seems never to have been deemed worthy of consideration by the courts in any of the numerous cases cited by us, with the exception of Commonwealth *v.* Roberts, *supra.* In that case the point was seriously considered and disposed of on principle as not well taken. The release of the accused in this case from custody upon taking the recognizance, was not a sufficient consideration therefor because the Government was not bound, the clerk having no authority to take the recognizance. The Government can only be bound by the acts of authorized officers.

73 We confidently submit that there is not an authority to be found which holds that bail are estopped to question the validity of a recognizance taken by an officer who had no authority to let to bail. If there is an authority which even lends any support to the opinion of this court, it has not been cited in the opinion.

II.

The court seems to lay considerable stress on the fact that the recognizance in question was acknowledged before the clerk at the request of the accused. This fact cannot affect the case, as will be seen by an examination of the authorities hereinbefore cited. Besides, this fact appears only from the parol evidence given at the trial. In deciding this case, the court has given consideration to this fact to make out a case against plaintiffs in error, and in so doing, we think, has committed error. A *scire facias*, to have execution on a recognizance given in a criminal case, is not the exclusive remedy. A suit by petition and summons is another. Littleton *v.* State, 46 Ark., 413; U. S. *v.* Insley, 54 Fed. Rep., 221. The court in the opinion say:

"Therefore, when the defendant- named in a writ of *scire facias*, by way of defense thereto, deny any of its recitals, it is incumbent on the plaintiff to verify the same by producing the record and files, and the facts in question cannot be otherwise proven unless the record and files have been lost or destroyed." Before com-

74 mencing proceedings to have execution on a recognizance it should first be determined whether the record and files of the court make a case against the sureties on the recognizance. If the record and files are complete and make a case against the sureties, then a *scire facias* proceeding can be commenced and successfully maintained. But if some of the records and files of the court are missing, so that the records and files remaining do not make a case against the sureties and a resort to parol evidence will be necessary to make a case, suit on the recognizance should be commenced by petition and summons, that parol evidence may be introduced; for such evidence is competent in a suit commenced in that way.

It can't be that the State can adopt a *scire facias* proceeding, which is purely a record proceeding, to have execution on a recognizance and in the midst of the trial, finding that the records and files of the court fail to make a case against the defendants, introduce parol evidence to make out a case. The authorities hold that the record must be complete, and that parol evidence is inadmissible.

In Neuoslia R. R. Co. *v.* Sperry, 3 Biss., 311, Blodgett, J., said:

"A *scire facias* is a proceeding or writ founded on some matter of record, and the rule is without exception, so far as my examination goes, that the record must be complete in itself, and no testimony is admissible *aliunde* for the purpose of making out a case."

In People *v.* Kane, 4 Denio, 535, it is said:

75 "Whatever is properly matter of record and proceeded on as such must exist and can be proved in that form alone. The law will not permit it to rest partly on record and partly in parol, but it must be made complete in its proper form. The gist of the action being matter of record, it must be that alone. There is no form of action, the gravamen of which, properly speaking, can be part matter of record or specialty and the residue matter *in pais.*"

See also, State *v.* Payton, 32 M. A. 527, and 2nd Foster's Federal Practice, sec. 368.

In the opinion it is also said:

"We know of no reason why it was not competent for the accused to waive the formality of an acknowledgment of the bond and an examination of the sureties before the district judge, and having obtained his discharge by means of such waiver, we know of no reason why he and his sureties should not be estopped from questioning the validity of the bond on that ground."

The court seem to forget that an instrument to be a recognizance must be acknowledged before an officer duly authorized for that purpose. An acknowledgment before a duly authorized officer is absolutely essential. Without such an acknowledgment an instrument is not a recognizance. If the acknowledgment is waived, the instrument is not a recognizance, and if not a recognizance, then a *scire facias* proceeding thereon can't be maintained. There could, therefore, be no waiver of the acknowledgment by the accused before the district judge.

76 It is also said in the opinion, after a statement of the circumstances under which the recognizance in suit was taken:

"Under these circumstances it would be trifling with the administration of justice to hold that the recognizance was invalid, because it was signed and acknowledged before the clerk." It is certainly not trifling with justice in a legal sense, for courts to so administer the law as not to impose obligations and duties upon parties where none have been assumed according to law. To hold plaintiffs in error liable on the recognizance in suit, is to disregard the authorities and well-settled principles of law, which should control and govern this court in a correct decision of this case.

Respectfully submitted.

HUGH C. WARD,
For Plaintiffs in Error.

Certificate of Counsel.

I, Hugh C. Ward, do certify that I am counsel for Robert H. Hunt and Hugh C. Ward, plaintiffs in error in the above-entitled cause, and that in my opinion, the foregoing petition for rehearing is well founded in point of law and is made in sincerity and good faith.

HUGH C. WARD,
For Plaintiffs in Error.

Endorsed: Filed June 25, 1894. John D. Jordan, clerk.

77 *Opinion on Petition for Rehearing.*

And on the tenth day of September, A. D. 1894, an opinion of said United States circuit court of appeals upon the petition for rehearing was filed in said cause in the following words, to wit:

78 United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1894.

ROBERT H. HUNT and HUGH C. WARD, Plaintiffs in Error, *vs.* THE UNITED STATES OF AMERICA, Defendant in Error.	No. 335. In Error to the District Court of the United States for the Western District of Missouri.

Mr. Hugh C. Ward for the motion.

Per Curiam:

In this case a petition for rehearing has been filed supported by an elaborate brief, which we have carefully read and duly considered. The chief complaint is that the decision heretofore rendered makes a void contract binding by the application of the principle of estoppel or waiver, which ruling, as counsel assert, "has not the support of a single authority." It is said that as the opinion concedes that there was no statute, State or Federal, authorizing the clerk of the United States district court to admit parties to bail, the bail bond in question was absolutely null and void, and could not be validated by any application of the doctrine of estoppel or waiver. There is, as we think, a fundamental error in the line of thought pursued by counsel, in that it is taken for granted that the clerk of the district court admitted the accused to bail. This was not the fact. Besides approving the sureties, the act of admitting an accused person to bail involves the determination of two questions in the decision of which the officer acts judicially. In the first place, it must be determined whether the offense of which the party stands accused is bailable, and, secondly, what amount of bail ought to be required. The decision of this latter question is always important, as article 8 of the amendments to the

Federal Constitution declares that "excessive bail shall not be
79 required." When an order has been made by the proper officer, allowing bail and fixing the amount thereof, the sureties tendered must, of course, be accepted or approved, and the release of the offender after the sureties have signed the bond is a sufficient approval. But no law of which we are aware requires the sureties to appear personally before the judge, unless they are to become bound by a technical recognizance such as is entered into in open court and spread upon the journal of its proceedings. When a bail bond is taken, as in the present case, and the obligation assumed by the sureties is evidenced by their signature to the bond, and not by the court record, it is not essential that they should appear personally before the court or judge. In accepting a bail bond a court or judge may undoubtedly act upon knowledge of its own or upon knowledge derived from third parties, as to the solvency of the sureties and as to the genuineness of their signatures. In point of fact, they do frequently so act in the interest of personal liberty; and it would sometimes lead to great hardship if they should act otherwise by requiring sureties to be brought from a great distance at great inconvenience and expense, to merely sign a bail bond in the presence of the judge. From what has been said, it is manifest that the clerk of the district court did not admit the accused to bail as counsel have erroneously assumed. The district judge discharged each important judicial function in connection with taking bail. He decided that the offense was bailable, and fixed the amount of the bond. He also ordered the clerk to approve the bond when it should be signed by two sureties. This order addressed to the clerk was tantamount to an approval in advance of a bond signed by two sureties whom the clerk might accept as sufficient. We are not prepared to admit that the action taken by the district judge in the matter of thus approving the bond, was even irregular; but conceding that it was irregular, such action was induced by the request of the accused that the bond might be so executed, so as to secure his more immediate release, and as we have heretofore held, and still think, it was competent for the accused and his sureties to waive the irregularity and they should be adjudged to have done so.

In conclusion, it is proper to add that we have examined the additional cases cited by counsel in support of the proposition that the bail bond now in suit is null and void, for the reason that it was signed in the presence of the clerk and not in the presence of the judge. With reference thereto, it may be said that the cases cited are generally cases where a person who was wholly unauthorized to take bail for the particular offense, assumed to do so on his own motion and to discharge each additional function connected therewith, or they are cases where the bail was taken contrary to the provisions of some express statute, which fact was held to render the obligation void. Commonwealth *v.* Otis, 16 Mass., 197; Chinn *v.* Commonwealth, 5 J. J. Marshall, 29; Dickenson *v.* State, 20 Neb. 72; Clink *v.* Russell, 58 Mich. 242; Butler *v.* Foster, 14
Ala., 323. We think upon an examination of the cases that
80 none of the citations in question are in necessary conflict

with the views which we have expressed and the principles upon which we have predicated our decision. The petition for a rehearing is accordingly denied.

Filed September 10, 1894.

81 *Order Denying Petition for Rehearing.*

And on the tenth day of September, A. D. 1894, in the record of the proceedings of the said circuit court of appeals is an order denying the petition for rehearing in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1894.

ROBERT H. HUNT and HUGH C. WARD, Plaintiffs in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error. } No. 335.

In error to the district court of the United States for the western district of Missouri.

This cause came on to be heard upon the petition for a rehearing and the briefs in support of same filed by Mr. Hugh C. Ward, of counsel for the plaintiffs in error.

On consideration whereof it is now here ordered and adjudged by this court that the said petition of plaintiffs in error for a rehearing be, and the same is hereby, denied.

September, 10, 1894.

Mandate.

And on the twelfth day of September, A. D. 1894, there was issued out of the clerk's office of said circuit court of appeals a mandate in said cause, directed to the district court of the United States for the western district of Missouri, in words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the district court of the United States for the western district of Missouri, Greeting:

[SEAL.]

82 Whereas lately, in the district court of the United States for the western district of Missouri, before you or some of you, in a cause between The United States, plaintiff, and Millard C. Curtis, Hugh C. Ward, and Robert H. Hunt, defendants, wherein the judgment of the said district court entered in said cause on the third day of July, A. D. 1893, is in the following words, viz:

"Now, on this day, being the regular term of the April term of the United States district court within and for the western district of Missouri, this cause coming on to be heard and Geo. A. Neal, United States attorney, being present on behalf of the plaintiff, and

the defendants, Hugh C. Ward and Rob't H. Hunt, being present in person and by attorney, and this cause having been heretofore submitted to the court on the 14th day of June, A. D. 1893, and by the court taken under advisement, and the court, now being fully advised of all and singular the matters and tthings submitted as aforesaid and having fully considered the premises, doth find the issues on behalf of the plaintiff, and doth order and adjudge that the plaintiff have judgment for the penalty of the recognizance and bond forfeited and sued on herein, and that plaintiff have and recover of and from the said defendants herein, Hugh C. Ward and Robert H. Hunt, in the sum of three thousand dollars ($3,000), and that execution issue therefor," as by the inspection of the transcript of the record of the said district court, which was brought into the United States circuit court of appeals, eighth circuit, by virtue of a writ of error agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas, in the present term of May, in the year of our Lord one thousand eight hundred and ninety-four, the said cause came on to be heard before the said United States circuit court of appeals on the said transcript of record, and was argued by counsel;

83 On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be, and the same is hereby, affirmed without costs to either party in this court.

MAY 7, 1894.

You, therefore, are hereby commanded that such proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the twelfth day of September, in the year of our Lord one thousand eight hundred and ninety-four.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

Endorsed: United States circuit court of appeals. No. 335. May term, 1894. Robert H. Hunt *et al.*, plaintiffs in error, *vs.* The United States. Mandate.

Supersedeas Bond.

And on the twelfth day of February, 1895, there was filed in the clerk's office of said circuit court of appeals in said cause a supersedeas bond in words and figures following, to wit:

THE UNITED STATES OF AMERICA, *sct:*

ROBERT H. HUNT and HUGH C. WARD, Plaintiffs in Error,
vs.
THE UNITED STATES, Defendant in Error.

Bond.

Know all men by these presents that we, Robert H. Hunt, Hugh C. Ward, and John E. Ward, are held and firmly bound unto the United States in the full and just sum of seven thousand dollars ($7,000) to be paid to the said United States; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

84 Sealed with our seals and dated this 31st day of January, in the year of our Lord 1895.

Whereas lately, at the May term of the circuit court of appeals of the United States in and for the eighth judicial circuit, in a suit pending in said court between Robert H. Hunt and Hugh C. Ward, plaintiffs in error, and The United States, defendant in error, judgment was rendered against the said plaintiffs in error, and the said plaintiffs in error have obtained a writ of error to the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States, citing and admonishing the said United States to be and appear in the Supreme Court of the United States, at the city of Washington, D. C.:

Now, the condition of the above obligation is such that if the said plaintiffs in error shall prosecute said writ of error to effect and answer all damages and costs if they shall fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

Signed, sealed, in the presence of—

R. H. HUNT. [SEAL.]
HUGH C. WARD. [SEAL.]
JNO. E. WARD. [SEAL.]

Bond approved as a supersedeas this 5th day of Feb'y, 1895.
DAVID J. BREWER, *Justice.*

STATE OF MISSOURI, } *ss:*
County of Jackson, }

I, John E. Ward of the county of Jackson, State of Missouri, the surety named in the within bond, do swear that I am worth in my own right more than twenty-five thousand dollars ($25,000) over and above all my debts, liabilities, and legal exemptions.

JOHN E. WARD.

Subscribed and sworn to before me this 2nd day of Febru-
85 ary, 1895. My term expires July 18, 1896.

[SEAL.] HERMAN F. WIEMAN,
Notary Public, Jackson Co., Mo.

Endorsed: No. 335. Robert H. Hunt *et al.*, plaintiffs in error, *vs.* The United States. Supersedeas bond on writ of error to Supreme Court U. S. Filed Feb. 12, 1895. John D. Jordan, clerk.

Writ of Error.

And on the twelfth day of February, A. D. 1895, a writ of error was filed in the clerk's office of said circuit court of appeals in said cause, the original of which is hereto attached and herewith returned.

86 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between Robert H. Hunt and Hugh C. Ward, plaintiffs in error, and The United States, defendant in error, a manifest error hath happened, to the great damage of the said plaintiffs in error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 5th day of February, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. 335. Robert H. Hunt *et al.*, plaintiffs in error, *vs.* The United States. Writ of error. Filed Feb. 12, 1895. John D. Jordan, clerk.

Return to Writ.

UNITED STATES OF AMERICA, *Eighth Circuit*, } *ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, Missouri, this sixteenth day of February, A. D. 1895.

Seal United States Circuit Court of Appeals, Eighth Circuit.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

87 *Citation.*

And on the twelfth day of February, A. D. 1895, a citation, with proof of service endorsed thereon, was filed in the clerk's office of said circuit court of appeals in said cause, the original of which is hereto attached and herewith returned:

88 UNITED STATES OF AMERICA, *ss:*

To the United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein Robert H. Hunt and Hugh C. Ward are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this fifth day of February, in the year of our Lord one thousand eight hundred and ninety-five.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. 335. Robert H. Hunt *et al.*, plaintiff- in error, *vs.* The United States. Citation. Filed Feb. 12, 1895. John D. Jordan, clerk.

On this eleventh day of February, in the year of our Lord one thousand eight hundred and ninety-five, personally appeared Hugh C. Ward before me, the subscriber, and makes oath that he delivered a true copy of the within citation to John R. Walker, United States district attorney for the western district of Missouri.

HUGH C. WARD.

Sworn to and subscribed the 11th day of February, 1895.

{ Seal of John C. Tate, Notary Public, Jackson County, Mo. }
{ Commission expires Sept. 14th, 1895. }

JOHN C. TATE,
Notary Public, Jackson Co., Mo.

89 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals, eighth circuit, do hereby certify that the foregoing eighty-eight pages contain full, true, and complete copies of all of the pleadings, proceedings, and record entries, including the opinions of said circuit court of appeals, in the case of Robert H. Hunt and Hugh C. Ward, plaintiffs in error, *vs.* The United States, defendant in error, No. 335, May term, 1894, as the same remain upon the files and records of said United States circuit court of appeals.

I further certify that the original writ of error and citation in said cause are hereto attached and herewith returned, and that a true copy of said writ of error is lodged in my office for the use of the defendant in error.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this 16th of February, 1895.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Endorsed on cover: Case No. 15,802. U. S. circuit court of appeals, eighth circuit. Term No., 230. Robert H. Hunt and Hugh C. Ward, plaintiffs in error, *vs.* The United States. Filed February 25, 1895.

166-424

Office Supreme Court, U. S.
FILED.
MAR 11 1897
JAMES H. McKENNEY,
CLERK.

166-424

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

ROBERT H. HUNT AND
HUGH C. WARD,
Plaintiffs in Error,
vs.
THE UNITED STATES,
Defendant in Error.

No. 230.

In Error to the Circuit Court of Appeals of the United States for the Eighth Judicial Circuit.

Abstract of Case and Brief of Argument of Plaintiffs in Error.

HUGH C. WARD,
For Plaintiffs in Error.

GERARD-WOODY PRINTING CO., N. Y. LIFE BLDG., KANSAS CITY, MO.

Sworn to and subscribed the 11th day of February, 1895.

{ Seal of John C. Tate, Notary Public, Jackson County, Mo. }
{ Commission expires Sept. 14th, 1895. }

JOHN C. TATE,
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89 United States Circuit Court of Appeals, Eighth Circuit.

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I further certify that the original writ of error and citation in said cause are hereto attached and herewith returned, and that a true copy of said writ of error is lodged in my office for the use of the defendant in error.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this 16th of February, 1895.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Endorsed on cover: Case No. 15,802. U. S. circuit court of appeals, eighth circuit. Term No., 230. Robert H. Hunt and Hugh C. Ward, plaintiffs in error, *vs.* The United States. Filed February 25, 1895.

166-11-24

Office Supreme Court, U. S.
FILED
MAR 11 1897
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

ROBERT H. HUNT AND
HUGH C. WARD,
Plaintiffs in Error,
vs.
THE UNITED STATES,
Defendant in Error.

No. 230.

In Error to the Circuit Court of Appeals of the United States for the Eighth Judicial Circuit.

Abstract of Case and Brief of Argument of Plaintiffs in Error.

HUGH C. WARD,
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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1896.

ROBERT H. HUNT AND
HUGH C. WARD,
Plaintiffs in Error,
vs.
THE UNITED STATES,
Defendant in Error.

No. 230.

In Error to the Circuit Court of Appeals of the United States for the Eighth Judicial Circuit.

ABSTRACT OF CASE.

This proceeding was originally commenced in the district court of the United States in and for the western division of the western district of Missouri, at Kansas City, January 16th, 1893, by the issuance of the following *scire facias* writ, to wit:

"UNITED STATES OF AMERICA,
Western Division of
The Western District of Missouri. } ss.

The President of the United States of America to the Marshal of the United States for the Western District of Missouri–Greeting:

Whereas, Millard C. Curtis, Hugh C. Ward and Robt. H. Hunt were recognized before Jno. M. Nuckols, clerk of the district court of the United States for the western district of Missouri, on the 24th day of September, A. D.

1892, to-wit: The said Millard C. Curtis in the sum of three thousand dollars, and the said Hugh C. Ward and Robert H. Hunt in a like sum of three thousand dollars, to be levied of their respective goods and chattels, land and tenements, and to the United States rendered, if the said Millard C. Curtis should fail to comply with the conditions of said recognizance: yet to be void upon condition that the said Millard C. Curtis personally appear before the district court of the United States for the western district of Missouri, at the next term thereof, to be begun and holden at Kansas City in said district on the first Monday in November, A. D. 1892, and from term to term of said court as he may be ordered so to do, and not depart the same without the leave of said court, and shall obey all the orders of said court, and answer an indictment found against him for embezzling moneys from United States National Bank, otherwise to remain in full force and virtue.

Now comes the district attorney on behalf of the United States, and the said defendant Millard C. Curtis, although solemnly called to come into court in discharge of his recognizance, comes not, but makes default, and the said Hugh C. Ward and Robt. H. Hunt, the sureties of the said Millard C. Curtis in the recognizance aforesaid, being also solemnly called and required to bring into court here the body of the said Millard C. Curtis, come not, but wholly fail and refuse to produce before the court here the said Millard C. Curtis according to the tenor of his said recognizance.

It is therefore considered, ordered and adjudged by the court, that the recognizance aforesaid of the said Millard C. Curtis and the said Hugh C. Ward and Robt. H. Hunt be forfeited, and that a *scire facias* issue on said forfeiture against said Millard C. Curtis and his said sureties, Hugh C. Ward and Robt. H. Hunt, returnable to the next term of this court.

Therefore you are hereby commanded to summon the said Millard C. Curtis and his surities, the said Hugh C. Ward and Robt. H. Hunt, to be and appear before the district court of the United States for the western division of the western district of Missouri, to be begun and holden at Kansas City the first Monday in April next, A. D. 1893, then and to show cause, if any they have or can show, why judgment should not be rendered against them, according to

the tenor of their said recognizance; and do you certify to our said court how you execute this writ.

Hereof fail not, and have you then and there this writ.

WITNESS, the Hon. Jno. F. Philips, Judge of the United States, for the western district of Missouri, this 16th day of January, A. D. 1893.

Issued at office in Kansas City, in said District, under the seal of said court, the day and year last above written.

(SEAL.) JNO. M. NUCKOLS, Clerk."

Rec. 4.

At the April term, 1893, of said court and on the 22nd day of May, 1893, plaintiffs in error filed an answer to said writ, the material parts of which in words and figures are as follows, to wit:

"Come now defendants, Robert H. Hunt and Hugh C. Ward, and for answer to the *scire facias* issued herein January 16th, 1893, against them, and for a showing of cause thereto, say:

First: On the 24th day of September, 1892, said defendants, together with one Millard C. Curtis, entered into a recognizance before the clerk of this court in words and figures as follows, to wit:

UNITED STATES OF AMERICA,
Western District of Missouri, } ss.
City of Kansas City.

Be it remembered that on this 24th day of September, A. D., 1892, before me, a clerk of the U. S. district court for the western district of Missouri, personally came M C. Curtis, Robert H. Hunt and Hugh C. Ward, and jointly and severally acknowledged themselves to owe the United States of America the sum of three thousand dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to wit:

The condition of this recognizance is such that if said M. C. Curtis shall personally appear before the district court of the United States in and for the district aforesaid, at Kansas City, Mo., on the 3rd day of the next regular

term thereof, and then and there to answer the charge of having on or about the 2nd day of June, 1892, within said district, in violation of Section 5209 of the revised statutes of the United States, unlawfully and feloniously did abstract, embezzle and willfully misplace certain moneys of a certain banking association, to wit:

One hundred and fifty and 75-100 dollars with intent to defraud said National Banking Association, contrary to the form of the statutes in such case made and provided, viz: Sec. 5209, and then and there abide the judgment of the said court, and not depart without leave thereof, then this recognizance to be void; otherwise remain in full force and virtue.

M. C. CURTIS. [SEAL]
ROBERT H. HUNT. [SEAL]
HUGH C. WARD. [SEAL]

Taken and acknowledged before me on the day and year first above written.

JOHN M. NUCKOLS,
Clerk U. S. Dist. Court.

Said defendants say that said clerk had no authority to take said recognizance; that said recognizance is therefore void, and for this reason judgment on said recognizance should not be rendered against said defendants.

* * * * * * * * *

Wherefore said defendants pray that they may be discharged without liability from said recognizance."

Rec. 7-10.

And afterwards, at the same term of said court, and on the 6th day of June, 1893, defendant in error filed a reply to answer of plaintiffs in error, the material parts on this writ of error being in words and figures as follows, to wit:

"And plaintiff further states, by its attorney aforesaid, that on the 24th day of September, 1892, one Henry Wollman, Esq., and one Thomas Morrow, Esq., attorneys-at-law, duly licensed and enrolled as members of the bar of this court, appeared before the Honorable John F. Philips, judge of this court, in chambers, and the said Curtis, by said attorneys, in all and singular directing and consenting thereto, appeared before the said judge as aforesaid, and the

said Geo. A. Neal, United States attorney, appeared in behalf of the plaintiff herein, when the said Curtis as aforesaid, by his attorneys, aforesaid, made application to the said judge at his chambers aforesaid, and prayed the said judge to reduce the amount fixed and required by said commissioner aforesaid, and that the said judge should fix the amount of bail required of said Curtis and admit him to bail; that said application was duly heard by said judge, as aforesaid, and was duly considered, and who then and there ordered that the said bail of the said Curtis should be fixed at the sum of three thousand dollars; that said Curtis and his said counsel were not then and there prepared and ready to enter into recognizance and give bail so fixed, as aforesaid, and requested to be allowed time to prepare the said recognizance and to procure sureties in that behalf, which said request was then and there granted by the said judge; that the Honorable John F. Philips, the said judge, after the determination of the matters aforesaid, prepared to leave his said chambers with the intention of being absent some days therefrom; that he then and there and at the request of the said, Curtis, by his counsel aforesaid, then and there made an order, which was reduced to writing and was directed to the clerk of this court, which said order was then and there signed by the said judge, and in which he directed and ordered the said clerk to take and approve a recognizance on behalf of the said Curtis, for the purposes aforesaid, in the said sum of three thousand dollars, with good and sufficient sureties, which said order was in words and figures as follows, to wit:

'KANSAS CITY, MO., Sept. 24th, 1892.

'John M. Nuckols, U. S. Dist. Clerk:

'In the case of the U. S. vs. M. C. Curtis, you may approve recognizance for him in the sum of three thousand dollars, with two sureties in addition to the principal, the same to be sufficient and approved by you.

'(Signed) JNO. F. PHILIPS, Judge.

That said order was delivered to the said Curtis and his said counsel for the purpose of presenting the same to the said clerk for the purpose aforesaid; that on the 26th day of September, 1892, the said Curtis, by his said attorneys in person

entered into a recognizance in writing (which is the recognizance in this cause) before the said John M. Nuckols, the said clerk, as aforesaid, in the absence of the said judge, with one Robert H. Hunt and Hugh C. Ward, the defendants herein, as his sureties, which said recognizance was signed by the said Curtis and by the said Ward and Hunt as sureties before the said clerk, who duly approved the same by virtue of the order aforesaid, and that the said Curtis was by virtue of the same set at liberty and discharged from the custody aforesaid into the custody of his said sureties; that at the time of the signing and at no other time, did the said Curtis nor his said sureties object to the taking of said recognizance in the manner and by the officer aforesaid, and plaintiff avers that the release and discharge of said Curtis as aforesaid was caused by the said Curtis and his said sureties, as aforesaid, and that they are estopped from denying the right and authority of the said officer in the premises aforesaid.

* * * * * *

Wherefore, plaintiff having fully replied to the answer of defendants, prays judgment of forfeiture heretofore rendered be made final and that execution issue thereon."

Rec. 14-15.

And on the same day, said cause coming on for trial, the defendant in error, to sustain the issues on its behalf, offered the following documentary evidence:

First. An affidavit of one J. E. McKee, made before L. E. Wyne, United States commissioner within and for the western district of Missouri at Kansas City, charging one Millard C. Curtis with embezzling and misapplying certain moneys of the American National Bank of Kansas City, Mo., and a warrant for the arrest of said Curtis issued by said Wyne with the return of the United States marshal for said district "not found" thereon. Rec. 18-20.

Second. An affidavit of one Frank Hitchcock made September 22, 1892, before one Philip A. Hoyne, United States commissioner within and for the northern district of Illinois at Chicago, charging one Millard C. Curtis with em-

bezzling and misapplying certain moneys of the American National Bank, of Kansas City, Missouri; a warrant for the arrest of said Curtis issued by said commissioner, and the order of said commissioner committing said Curtis to the Cook county jail, upon proof of probable cause to believe the said Curtis guilty of said offense, and on account of his failure to furnish bail in the sum of ten thousand dollars. Rec. 21-23.

Third. A warrant issued by W. Q. Gresham, circuit judge, for the removal of said Curtis from the northern district of Illinois, where arrested, and committed to the western district of Missouri, where the trial was to be had, in words and figures as follows, to wit:

"*Walter Q. Gresham, Judge of the Circuit Court of the United States of America, for the Northern District of Illinois, to the Marshal of the same District, Greeting:*

Whereas, Millard C. Curtis has been committed to jail under and by virtue of a commitment made by a United States commissioner for this district, a copy of which commitment is hereunto annexed; and the United States attorney for this district has made application to me for a warrant for the removal of the said prisoner, under the provisions of section 1014 of the revised statutes to the western district of Missouri, in which district the offense for which he has been so commited is to be tried; and the said prisoner has been brought before me, and due examination of the matter has been made.

Therefore you are hereby commanded, in the name and by the authority of the said United States, that you forthwith remove the said prisoner now in your custody to the said western district of Missouri and there deliver him to the marshal of that district, in order that the said prisoner may be dealt with according to law.

Given under my hand and the seal of the said district court, at Chicago, in the said northern district of Illinois, this twenty-third day of September, A. D. 1892, and of the Independence of these United States the 117th year.

W. Q. Gresham,
Circuit Judge.

Attest:

..... Clerk.

Received the prisoner, Millard C. Curtis, named in this warrant, from Frank Hitchcock, marshal of the northern district of Illinois, at Kansas City, in the western district of Missouri, this 24th day of September, A. D. 1892.

John P. Tracey,

U. S. Marshal Western District of Missouri.

By John Tracy, Deputy.

By virtue of this warrant I removed the prisoner, Millard C. Curtis, therein named to Kansas City, in the western district of Missouri, and there delivered him to the marshal of that district the 24th day of September, A. D. 1892.

Frank Hitchcock,

U. S. Marshal Northern District of Illinois.

By H. E. Charles, Deputy.
Marshal's fees:

UNITED STATES OF AMERICA,
Northern District of Illinois, } ss.
Northern Division.

The President of the United States of America to the Marshal of the Northern District of Illinois, and to the keeper of the jail of the County of Cook, Greeting:

Whereas, Millard C. Curtis—been arrested and brought before me, Philip A. Hoyne, a commissioner appointed by the circuit court of the United States of America in and for the northern district of Illinois, under and by virtue of the act of congress in that behalf approved February 20, 1812, and of the acts amendatory thereof, for examination, by virtue of a warrant issued by me, upon the complaint of Frank Hitchcock made before me in writing, on oath, charging the said Millard C. Curtis with violation of the banking laws of the United States, to wit: Section 5209 of the revised statutes; in being cashier, assistant cashier and agent of a centain banking association organized under the laws of the United States, and embezzling and misapplying certain of the moneys of said association, with intent to defraud said association; and whereas, on such examination, it appears to me that there is probable cause to believe the

said Millard C. Curtis guilty of said offense, and I have directed him to enter into recognizance with sufficient surety in the penalty of ten thousand dollars for his appearance for trial on said charge at the March term of the district court of the United States for the western district of Missouri, western division, or in default thereof, that he be committed to the jail of Cook county in said district.

And whereas, the said Millard C. Curtis has not offered such recognizance, you, the said marshal, are hereby commanded that you convey the said Millard C. Curtis to the jail of the county of Cook; and you, the said keeper of the said jail, are hereby commanded that you receive the said Millard C. Curtis into said jail and him there safely and securely keep until he be discharged therefrom by due course of law.

In witness whereof, I have hereunto set my hand and seal, at Chicago in said district, this 22nd day of September, 1892, and of the Independence of the United States the 117th year.

[SEAL.] PHILIP A. HOYNE,

U. S. Commissioner Northern District of Illinois."

Rec. 27-29.

Plaintiffs in error at the time objected to such warrant of removal for the reason that the same was indefinite, in that it simply commanded the marshal of the northern district of Illinois to remove Curtis to the western district of Missouri, and for the reason that the same did not appear to have been filed with the clerk of the United States district court at Kansas City, and for the further reason that the same was issued by W. Q. Gresham, a circuit judge, and not by the judge of the district as required by the act of congress; but these objections were overruled by the court and excepted to at the time by plaintiffs in error.

Rec. 29.

Fourth. Three indictments returned by the grand jury of the United States in the district court of the United States for the western division of the western district of Missouri, November 14, 1892, which indictments were separately

numbered and docketed in said court. The first, number 1302, *United States v. Millard C. Curtis*, charging said Curtis with making false entries in the books of the American National Bank of Kansas City, Missouri; the second, number 1336, *United States v. Millard C. Curtis*, charging said Curtis with fraudulently issuing bills of exchange on said bank; the third, number 1335, *United States v. Millard C. Custis*, charging said Curtis with abstracting, embezzling and misapplying certain moneys of said bank. (Rec. 28).

Fifth. The recognizance in suit, a copy of which is set out in answer of plaintiffs in error, with the following order attached thereto:

"Kansas City, Mo., September 24, 1892.

John M. Nuckols, U. S. District Clerk:

In the matter of the United States v. M. C. Curtis you may approve recognizance for him in the sum of three thousand dollars with two sureties in addition to the principal, the same to be sufficient and approved by you.

JOHN F. PHILIPS, Judge."

Supra 2, Rec. 23, 27.

The plaintiffs in error at the time objected to such recognizance for the reason that the same was not taken by an officer authorized by law, and was therefore void. This objection being by the court overruled, plaintiffs in error at the time excepted. (Rec. 24).

Sixth. The order of forfeiture of the recognizance in suit. Rec. 24.

In addition to this documentary evidence, defendant in error, over the objections of plaintiffs in error, introduced parol testimony which tended to prove these facts: Curtis was arrested in the city of Chicago, Sept. 22, 1892, by a deputy United States marshal on a warrant issued by United States Commissioner Hoyne, and taken before said Hoyne, who committed him on the same day to the Cook county jail

in the city of Chicago on account of his inability to furnish bail in the sum of ten thousand dollars. (Rec. 27).

Upon application being made to the United States circuit judge, W. Q. Gresham, who at the time was holding circuit court in the city of Chicago, a warrant for the removal of Curtis from the northern district of Illinois to the western district of Missouri was issued by Judge Gresham, and Curtis was removed thereunder to Kansas City, Mo., by a deputy United States marshal for the northern district of Illinois, and on the 24th day of September, 1892, was delivered to the United States Marshal for the western district of Missouri. The deputy United States marshal returned to the city of Chicago on the evening of the 24th day of September, taking with him the warrant of removal, and filed the same with the clerk of the United States circuit court in the city of Chicago. Upon application of the United States marshal for the western district of Missouri, John M. Nuckols, clerk of the United States district court at Kansas City, on the same day issued the commitment hereinbefore set forth, committing Curtis to the county jail of Jackson county, Missouri. Rec. 27.

September 24, 1892, counsel for Curtis orally applied to Judge John F. Phillips, United States judge for the western district of Missouri, to reduce the amount of bail fixed by United States commissioner Hoyne. The application was informally heard by Judge Phillips in the office of the United States district attorney in Kansas City, and the amount of bail was by him reduced to the sum of three thousand dollars. Counsel for Curtis, thinking that they might not be able to furnish bail at once, requested Judge Phillips to make an order for the clerk to take the recognizance so that they could secure the release of Curtis in his absence. This Judge Phillips did in writing, and delivered the same to counsel for Curtis, who, with plaintiffs in error, on the 24th day of September, 1892, went to the office of John M. Nuckols, clerk of the United States district court at Kansas City, where the recognizance in suit was executed. No writ of

habeas corpus was applied for, and none was issued. Rec. 30.

At the time this parol evidence was offered plaintiffs in error objected to the same for the reason that oral evidence was illegal and incompetent in a *scire facias* proceeding on a forfeited recognizance, and at the conclusion thereof moved the court to exclude the same for the same reason. This motion the court overruled and plaintiffs in error at the time excepted. (Rec. 27–31.)

At the time this cause was submitted to the court, which was the 14th day of June, 1893, plaintiffs in error requested the court to give the following declaration of law, to wit:

"The court declares the law to be, that upon the pleadings and evidence in this case, the finding and judgment must be for defendants Ward and Hunt."

This declaration of law the court refused to give, and to the action of the court plaintiffs in error at the time duly excepted. (Rec. 31.)

July 3, 1893, judgment having been rendered by the trial court against plaintiffs in error in the sum of three thousand dollars, thereupon plaintiffs in error carried this case, by writ of error, to the United States circuit court of appeals for the eighth judicial circuit for review, where, on the 7th day of May, 1894, such judgment was affirmed.

This being a case in which the judgment of said circuit court of appeals is not made final by the terms of the circuit court of appeals, act of March 3, 1891, and the amount in controversy exceeding one thousand dollars, besides costs, plaintiffs in error have brought this case here from said circuit court of appeals, by writ of error, for review by this court.

ASSIGNMENT OF ERRORS.

1. The trial court erred in rendering judgment for defendant in error and against plaintiffs in error, as did also the circuit court of appeals err in affirming the judgment of such trial court. Rec. 17,45.

2. The trial court erred in admitting, over the objection of plaintiffs in error, parol evidence as to the disposition of Curtis in Kansas City, Missouri, on September 24, 1892, made by the deputy United States marshal for the northern district of Illinois, and the circuit court of appeals erred in holding the error in the admission of such evidence to be immaterial and not such as to warrant the reversal of the judgment of the trial court. Rec. 27.

3. The trial court erred in admitting, over the objection of plaintiffs in error, parol evidence, offered by defendant in error, that Curtis and his attorneys, on September 24, 1892, appeared before the judge of the United States district court at Kansas City, Missouri, at chambers, and asked that the amount of his bail be reduced by said judge, and the circuit court of appeals erred in holding that the admission of such illegal and incompetent evidence by the trial court was not prejudicial error. Rec. 30.

4. The trial court erred in admitting, over the objection of plaintiffs in error, parol evidence that the sufficiency and approval of the sureties on the recognizance in suit were referred to the clerk of the United States district court at Kansas City, Missouri, at the instance and with the consent of Curtis and his attorneys, and the circuit court of appeals erred in considering such illegal and incompetent evidence in determining the liability of plaintiffs in error in this case. Rec. 30, 44.

5. The trial court erred in admitting in evidence, over the objection of plaintiffs in error, the recognizance in suit, and the circuit court of appeals erred in holding such recognizance to have been properly admitted in evidence by the trial court. Rec. 23.

6. The trial court erred in refusing to give the following declaration of law requested by plaintiffs in error, to wit:

"The court declares the law to be that upon the pleadings and evidence in this case the finding and judgment must be for the defendants Ward and Hunt."

And the circuit court of appeals erred in holding that such declaration of law was rightly refused by the trial court. Rec. 31.

BRIEF OF ARGUMENT.

I.

Jurisdiction of this Court to review this case on writ of error.

Before proceeding to a discussion of the assigned errors upon which plaintiffs in error rely for a reversal of the judgment rendered herein against them, the right of this court to review this case on writ of error to the circuit court of appeals, though perfectly plain in our judgment, will be noticed.

That a *scire facias* proceeding on a recognizance is a civil action or suit is well settled by the authorities.

In *Commonwealth v. Stebbins*, 4 Gray, 26, the supreme court of Massachusetts said:

"In this court, in the case of *Commonwealth v. McVeill*, 19 Pick. 127, this whole subject of recognizances in criminal cases and the manner of proceeding to enforce the payment of the same in case of a breach of the condition, is very elaborately considered. The position is directly affirmed that the remedy to enforce such forfeiture is 'by debt or *scire facias*, which is a civil action. (19 Pick. 138.) Such a recognizance, therefore, when given in courts holding exclusive criminal jurisdiction, is, in the absence of any statute provision, required to be certified to a civil court and there placed on record preliminary to issuing a *scire facias*."

In *State v. Harlow*, 26 Me. 74, the supreme court of Maine said:

"It is well settled that a *scire facias* is a suit or action. *McLellan v. Lunt*, 14 Me. R. 254. And when brought upon a recognizance is always an original proceeding, though otherwise when upon a judgment. 6 Dane's Abridgement, C. 194, Art. 1. Sec. 8; Howe's Practice, 72. A recovery of judgment upon *scire facias* upon a recognizance entered

into to prosecute an appeal from a judgment in a criminal process and a satisfaction thereof is not satisfaction of the judgment from which the appeal was taken. Rev. Stat. 170, Sec. 10. The *scire facias* is merely to obtain the forfeiture and is often against those not implicated in the criminal offense charged. The action must be regarded as of a civil nature equally with one in another form upon a note which may be given to the state in satisfaction of the costs, which are a part of the sentence on conviction of a crime."

In *State v. Kinne*, 41 N. H. 238, it was held that *scire facias* upon a recognizance entered into in a criminal proceeding is a civil suit and partakes in no respect of the nature of a criminal proceeding and the respondents, who prevail against the state upon such *scire facias*, are not entitled to costs.

In *State v. Posey*, 79 Ala. 45, it was said:

"The proceeding is one by *scire facias* to make absolute a conditional judgment taken against the defendants as sureties on a forfeited bail bond. Such a proceeding is purely civil and not criminal in its nature, being merely a suit for the recovery of money."

In *Stearns v. Barrett*, 1 Mason, 153, the question being whether the United States circuit court had appellate jurisdiction to review a *scire facias* case decided by the United States district court under Sec. 22 of Chap. 20 of the judiciary act of 1789, giving appellate jurisdiction to the circuit court from all final decrees of the district court in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeded three hundred dollars, and from all final decrees and judgments "in civil actions" where the matter in dispute exceeded fifty dollars. Mr. Justice Story said;

"A *scire facias* is a judicial writ and yet it is held to be an action because the defendant may appear and plead thereto. And precisely for the same reason this proceeding must be deemed an action and it is clearly a civil as distinguished from a criminal action."

In *State v. Baker*, 50 Me. 45, it is said:

"The taking of a recognizance or bail bond is wholly

collateral to the original proceeding. The recognizance taken in criminal cases is in its nature a civil matter. The fact that it depends on a record in connection with a criminal case does not affect its character. If the magistrate had jurisdiction to take it, it is subject to the same rules of construction and treatment as any other civil matter."

Suit for the collection of a recognizance given in a criminal case may be commenced by the issuance of a *scire facias* writ or by filing a petition as in an ordinary action at law. *Littleton v. State*, 46 Ark. 43; *U. S. v. Insley*, 54 Fed. Rep. 221; *Commonwealth v. McNeil*, 19 Pick. 127. Where such a suit is commenced by the issuance of a *scire facias* writ on a recognizance such writ takes the place of the declaration or petition in an ordinary suit at law and must state a cause of action and the principal and sureties on such recognizance may demur or plead thereto as in an ordinary action at law.

In *Andress v. State*, 3 Blackford's Reports, 108, it is said:

"A *scire facias*, although a judicial writ, must be considered as an original action to which the defendant may plead, and therefore *must contain a legal cause of action on its face*. 6 Bac. Abr. 103; Tidd's Prac. 98. The *scire facias* certainly does not contain any legal cause of action. Although every word on its face may be true, yet the state is not by such statement of facts as it contains legally entitled to execution. It lacks several material averments other than those above pointed out."

In *Lang v. State* 3 Blackford's Reports, 344, it is said:

"The next objection is a very general one, and applies to the whole record and proceedings. This court has said, in the case of Andress v. the State, that a *sci. fa.*, though a judicial writ, must be considered as an original action to which the defendant may plead; that it must contain a legal cause of action; that it must show a sufficiency on its face to authorize the judgment asked for. This decision of the court is well sustained by reason, justice and the authorities and will not be departed from. The *sci. fa.* in this case is founded upon a recognizance not taken by a court of record; and a recognizance not taken by a court of record is not

strictly a record until it is filed and entered in a court of record by the proper authorities; and often not then unless it is taken by a person legally authorized. Hence every *sci. fa.* founded on such recognizance should show by proper averments that the person taking it was legally authorized so to do, and that he filed it in the proper court of record to be recorded, and that it was so recorded and thereby became a part of the record of said court and still so remains, etc. 2 Marsh 132; 2 Evans Harris 470. The *sci. fa.* in these and other particulars is wholly defective."

And in *Gray v. State*, 5 Ark., 265, it was held that a *scire facias* upon a recognizance of bail in a criminal case is to be regarded as an original writ and as an institution of a new suit; that a *scire facias* occupies the place of both writ and declaration and must set forth with legal certainty all the facts necessary to show a good legal right of action in the plaintiff, and that if it fails to do so it will sustain no judgment against the defendant—not even one by default; and that if founded on a recognizance the *scire facias* must state it either literally or substantially and show where it was acknowledged; so that it may appear to have been entered into before some court or person authorized to take it. And it was further held that if a *scire facias* was defective in these respects error will lie for refusal to arrest a judgment by default rendered on it.

We conclude then that this proceeding is a suit at common law in which the United States are plaintiffs, the *scire facias* writ taking the place of a petition and summons in an ordinary civil action.

If it be settled by the authorities just cited, as it certainly is, that this proceeding is a suit at common law in which the United States are plaintiffs, an examination of the federal statutes relating to the jurisdiction of courts, which will now be made, will demonstrate that this court has jurisdiction to review this case.

By Sec. 5 of the circuit court of appeals act, March 3, 1891, appeals or writs of error may be taken from the circuit court directly to the supreme court in six specified classes

of cases: where the jurisdiction of the court below is in issue; in prize causes; in cases of convictions of capital or otherwise infamous crimes; in cases involving the construction or application of the constitution of the United States; in cases in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question; in cases where the constitution or law of a state is claimed to be in contravention of the constitution of the United States. By the 6th section of such act it is provided that the circuit court of appeals shall have appellate jurisdiction "in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law." Now, it is further provided by that section that "the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states; also in all cases arising under the patent laws, under the revenue laws and under the criminal laws and in admiralty cases"; and the last paragraph of that section provides that "in all cases not hereinbefore in this section made final there should be of right an appeal or writ of error or review of the case by the supreme court of the United States where the matter in controversy shall exceed one thousand dollars besides costs."

By Sec. 4 of the judiciary act of March 3rd, 1891, the appellate jurisdiction of the circuit courts which at that time existed was abolished and the entire appellate jurisdiction was vested by such act in the supreme court of the United States and in the circuit courts of appeals therein established. *McLish v. Roff et al*, 141 U. S. 661.

By Sec. 563, R. S. U. S,, jurisdiction was given to the district courts of all suits at common law brought by the United States or by any officer thereof authorized by law to sue, and by Sec. 629 R. S. U. S., like jurisdiction was given to the circuit courts of the United States. In other

words, all suits at common law brought by the United States, or by any officer thereof authorized by law to sue, might be maintained in either the district or circuit courts.

By Sec. 633, R. S. U. S., it was provided that final judgments of a district court in civil actions, where the matter in dispute exceeded the sum or value of fifty dollars, exclusive of costs, might be re-examined and reversed or affirmed in a circuit court held in the same district, upon a writ of error. Such appellate jurisdiction of circuit courts was, however, abolished by the judiciary act of March 3rd, 1891.

It will thus be seen that the district and circuit courts have jurisdiction alike of suits at common law in which the United States are plaintiffs and that the circuit court prior to the judiciary act of March 3rd, 1891, had appellate jurisdiction to review suits at common law brought by the United States in the district courts where the matter in dispute exceeded the sum or value of fifty dollars, exclusive of costs.

As suits in which the United States are plaintiffs or petitioners are not enumerated as falling within any of those cases of which the supreme court of the United States has appellate jurisdiction under Sec. 5 of the judiciary act of March 3rd, 1891, and as judgments or decrees in cases in which the ground of jurisdiction of the district and circuit courts is that the United States are plaintiffs or petitioners are not made final in terms by Sec. 6 of such act, such cases would therefore fall within the last paragraph of Sec. 6 unless restricted by the previous enumeration. That there is no such restriction is settled by *U. S. v. American Bell Telephone Co.*, 159 U. S. 70.

The appellate jurisdiction of the circuit courts having been abolished by the judiciary act of March 3, 1891, and the appellate jurisdiction of the national courts having been distributed by such act between the supreme court of the United States and the circuit courts of appeals in such a way as to give the circuit court of appeals for the eighth

judicial circuit jurisdiction to review the judgment of the district court in this case on writ of error, and the judgments in cases in which the ground of jurisdiction of the district and circuit courts is that the United States are plaintiffs not being made final in terms by the 6th section of such act, and the matter in controversy in this case exceeding one thousand dollars, besides costs, we submit that this court has jurisdiction to review this case on writ of error to the circuit court of appeals for the eighth judicial circuit.

But it may possibly be suggested that the case at bar is a case arising under the criminal laws and that, as the 6th section of the judiciary act of March 3, 1891, makes the judgment of the circuit court of appeals in such a case final, this court is without jurisdiction to review this case. That this is not a case arising under the criminal laws is perfectly plain. This action is simply one at common law commenced by the United States to recover of plaintiffs in error the sum of three thousand dollars claimed to be due on a recognizance, the taking of which was wholly collateral to the original criminal proceeding, and was commenced by the United States by the issuance of a *scire facias* writ and not by petition and summons as it might have been. If commenced in that way it would hardly be contended that such suit was one arising under the criminal laws. We have already seen that a *scire facias* proceeding to have execution on a recognizance is a civil suit.

By Sec. 563, R. S. U. S., it is provided that the district courts shall have jurisdiction of all crimes and offenses cognizable under the authority of the United States committed within their respective districts, or upon the high seas, the punishment of which is not capital except in the cases mentioned in Sec. 5412, title "Crimes."

By Sec. 629, R. S. U. S., it is provided that the circuit courts shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where it is or may be otherwise provided by law,

and concurrent jurisdiction with the district courts of crimes and offenses cognizable therein.

Prior to the judiciary act of March 3rd, 1891, the circuit court for each judicial district could re-examine by writ of error all criminal cases tried before the district court where the sentence is imprisonment or a fine and imprisonment or a fine in excess of three hundred dollars. Act of March 3rd, 1879, Chapter 176, Section 2; 1 Supp. U. S. R. S., p. 452; 20 St. at. L., 354.

It will thus be seen that the district and circuit courts at the time of the passage of the judiciary act of March 3rd, 1891, had jurisdiction of criminal cases and that the circuit courts had appellate jurisdiction to re-examine by writ of error all criminal cases tried in the district courts where the sentence was imprisonment or a fine and imprisonment or a fine in excess of three hundred dollars.

By Secs. 563 and 629 R. S. U. S., jurisdiction is given to the district and circuit courts of all suits at common law brought by the United States or by any officer thereof authorized by law to sue.

So it will be seen that at the time of the passage of the judiciary act of March 3rd, 1891, the district and circuit courts were given jurisdiction of all suits at common law by the United States, and also of all crimes and offenses cognizable under the authority of the United States, which are two entirely distinct classes of cases.

And by the 6th section of the judiciary act of March 3rd, 1891, it is provided that circuit courts of appeals established by that act should exercise appellate jurisdiction to review by appeal or by writ of error final decisions in the district court and in the existing circuit courts in all cases other than those of which the supreme court of the United States is given appellate jurisdiction by the preceding section of such act. By the terms of such act, then, suits at common law brought by the United States or any officer thereof authorized by law to sue, and cases arising under the criminal laws, can be re-examined by appeal or writ of

error in the circuit court of appeals. It is further provided in said section 6 that the judgments and decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens or citizens of the United States or citizens of different states; also in all cases arising under the patent laws, under the revenue laws and under the criminal laws and in admiralty cases, excepting that in every such subject within its appellate jurisdiction the circuit courts of appeals at any time may certify to the supreme court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. It is nowhere provided in such act that the judgments and decrees of the circuit courts of appeals shall be final in suits at common law commenced by the United States or by any officer thereof authorized by law to sue. It was plainly the intention of Congress to make the decision of the circuit courts of appeals final in all criminal cases of which those courts were given appellate jurisdiction by such judiciary act.

In *U. S. v. American Bell Telephone Co.*, 159 U. S., 69, it was held by this court that under the 5th and 6th sections of the judiciary act of March 3rd, 1891, the circuit courts of appeals have appellate jurisdiction in all cases in which original jurisdiction is conferred on the circuit courts by reason of the United States being plaintiffs or petitioners, including the case of a bill by the United States to cancel a patent for an invention, and that the proviso in said section 6 making the decisions of the circuit courts of appeals final in all cases arising under the patent laws did not apply to suits brought by the United States to cancel patents, for in such suits the circuit courts of appeals have jurisdiction on the additional ground that the United States is a party, and in suits coming within their jurisdiction on that ground their decisions are not final. That case, though a suit by the United States to cancel a patent for an invention granted to the American Bell Telephone Co., is on principle decisive

of the jurisdictional question in this case, for there it was contended that a suit by the United States to cancel a patent was a case arising under the patent laws, and for that reason the decision of the circuit court of appeals in that case was final.

II.

Record proper insufficient to support the judgment rendered.

The trial Court erred (first assigned error) in rendering judgment for Defendant in Error as did also the Circuit Court of Appeals in affirming such judgment.

Having disposed of the jurisdictional question in this case to our satisfaction, if not to that of this court, we now pass to the consideration of the merits of this case, taking up the assigned errors *seriatim*.

The *scire facias* in this case, issued January 16th, 1893, charges that one M. C. Curtis and plaintiffs in error were recognized on September 24th, 1892, before John M. Nuckols, clerk of the United States district court for the western district of Missouri. (Rec. 4). The answer of plaintiffs in error, after setting out *in haec verba*, the recogniznance in suit, which shows on its face that it was taken September 24th, 1892, by John M. Nuckols, clerk of said United States district court, charges such recognizance to be void because said clerk was not authorized by law to take the same. (Rec. 7–8). The reply of defendant in error thereto alleges that the judge of said district court, after fixing at chambers the amount of bail to be furnished by M. C. Curtis, the accused, made an order in writing, in which he directed and ordered the clerk of said court to take and approve said recognizance, and that on the 24th day of Sep-

tember, 1892, said Curtis, in the absence of said judge, entered into said recognizance before said clerk with plaintiffs in error as sureties, and that said clerk duly approved said recognizance by virtue of said order of said judge and discharged said Curtis thereon. (Rec. 14–15). From the record proper, then, in this case, it appears that the judge of said district court, on the 24th day of September, 1892, fixed the amount of bail to be given by Curtis at three thousand dollars, and authorized, in writing, the clerk of said court to take and approve a recognizance in that amount, which the said clerk on the same day did in the absence of said judge.

The first question in this case arises on the record proper and is whether defendant in error was entitled to judgment on the pleadings in this case as they stood at the time of the rendition thereof by the trial court. In other words, whether the pleadings in this case as they then stood were sufficient to support a judgment for defendant in error.

Our contention is that the recognizance in controversy is absolutely void because taken by an officer who did so without authority of law, and that as it was apparent upon the face of the record proper that such recognizance was so taken the trial court erred in rendering judgment for defendant in error, as did also the circuit court of appeals in affirming such judgment on writ of error.

No motion in arrest of judgment was filed in the trial court, but, as said by this court in *Slacum v. Pomery*, 6 Cranch., 221, where, as here, no motion in arrest of judgment was filed "it is not too late to allege as error in this court a fault in the declaration which ought to have prevented the rendition of a judgment in the court below." It was also held, in *Garland v. Davis*, 4 How., 132, that this court could notice a material and incurable defect in the pleadings and verdict as they are represented in the record to have existed in the court below, although such defect is not noticed in the bill of exceptions nor suggested by counsel in argument.

Again, in *Bond v. Dustin*, 112 U. S., 604, it was held that in an action at law where the bill of exceptions could not be considered this court might determine whether the declaration was sufficient to support the judgment.

The *scire facias* in this case, which, as we have seen, is the declaration of defendant in error, is insufficient upon its face to authorize a judgment against plaintiffs in error; for, while such *scire facias* alleges that such recognizance was taken by the clerk of the United States district court, it nowhere alleges that such person was legally authorized to take the same or that such person filed such recognizance in the proper court of record to be there recorded. That an omission of such averments is fatal to a judgment is settled by *Lang v. State*, 3 Blackford's Reports, 344, *supra*. *Chinn v. Commonwealth*, 5 J. J. Mar. 30, and *Gray v. State*, 5 Ark. 265; U. S. v. Steiner, 56 Fed. 428. It is also settled that courts will not enforce an illegal contract, although its illegality is not set up in defense to an action thereon. But here such illegality is set up in defense.

In *Claflin v. U. S. Credit System Co.*, 165 Mass. 501 the court said:

"The illegality of the contract is not set up in defense, nor was it noticed in the superior court where the plaintiff had a verdict. But no court will consciously lend its aid for the enforcement of an illegal contract."

So, if it be true, as we contend, that the *scire facias* is insufficient on its face to support a judgment or, that the recognizance, on which the *scire facias* in this case is based, is void on its face because taken by a person not legally authorized to take the same, and appears to be so on the face of the record proper, the trial court was unauthorized to enter up a judgment against plaintiffs in error. *Antonez v. State*, 26 Ala. 81.

III.

The recognizance in suit is void because clerks of Federal Courts are not authorized by law to take recognizances.

We now come to the main question in this case, and that is whether clerks of federal courts are authorized by law to take and approve recognizance. So far it has been asserted simply that the recognizance in question was void because the clerk of the district court, who took the same did so without authority of law. But we now propose to demonstrate to this court that such clerk, in taking such recognizance, acted without authority of law and that a recognizance so taken is absolutely void.

1. The District Judge was not authorized to bail Curtis agreeably to the usual mode of process against offenders in the State of Missouri.

The learned trial judge held the recognizance in suit valid, and in doing so *inter alia*, said:

"The application was made to the judge of the district for reduction of bail. It is true this application was not in writing, nor indeed was it necessary that it should be. The U. S. district judge in such matter proceeds just as a state officer having jurisdiction would proceed. *Had such application been made to a state circuit judge in a state case the judge could have fixed the amount of bail and directed the clerk to approve the bond.* Such state judge has this authority whether sitting in court or at chambers. It is an authority which adheres to his office."

Rec. 35.

In support of his holding he cited sections 4124, 4125, 5385 and 5386 Rev. Stats. Mo., 1889.

The learned judge, in holding that a United States district judge in the matter of bail proceeds as a state officer,

evidently had in mind section 1014 R. S. U. S. We respectfully submit that such judge is not authorized in every case to proceed in the matter of bail of offenders against the laws of the United States as a state judge having jurisdiction would proceed.

Section 1014 R. S. U. S., in part, provides as follows:

"For any crime or offense against the United States the offender may by any justice or judge of the United States or by any commissioner of a circuit court to take bail, or by any chancellor, judge, chief or first judge of common pleas, mayor of a city, justice of the peace or other magistrate of any state where he may be found, and agreeably to the usual mode of process against offenders in such states, and at the expense of the United States, be arrested and imprisoned or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense."

This section clearly provides that an offender against the laws of the United States is to be arrested and imprisoned or bailed agreeably to the usaal mode of process of the State where found or where arrested. Under this section, if the offender be found in the State of Illinois, he is to be arrested and imprisoned or bailed agreeably to the usual mode of process against offenders in the State of Illinois; if found in the State of Missouri, he is to be arrested and imprisoned or bailed agreeably to the mode of process against offenders in the State of Missouri.

In *U. S. v. Horton Sureties*, 2 Dill., 94, Judge Dillon, in construing Sec. 1014, used this language:

"Congress has not seen fit to prescribe a uniform mode of its own in respect to preliminary proceedings against persons accused of a violation of its criminal enactments, but in the thirty-third section of the judiciary act, it is provided that the procedure in such cases should be agreeably to the usual mode of process against offenders in such state, that is, in the state where the offender may be arrested and the proceedings had. To this section we must resort to ascertain the powers of commissioners in respect to the arrest, imprisonment and bail of offenders against the laws of the United States. The meaning of this section was very care-

fully considered by Mr. Justice Curtis in *The United States v. Rundlett, supra.* This learned judge says: "My opinion is that it was the intention of congress by these words "agreeably to the usual mode of process against offenders in such state" to assimilate all proceedings for holding accused persons to answer before a court of the United States to proceedings had for similar purposes by the laws of the state *where the proceedings should take place*; and as a necessary consequence that the commissioners have power to order a recognizance to be given to appear before them in those states where justices of the peace or other examining magistrates, acting under the laws of the state have such power. The prisoner is not only to be arrested and imprisoned, but bailed agreeably to the usual mode of process in the state."

From the statute itself, without the aid of judicial construction, it would seem perfectly clear that only those officers who have jurisdiction within the district where the offender is arrested, are authorized to bail agreeably to state laws.

Curtis was arrested in the city of Chicago, in the northern district of Illinois, September 22, 1892, and on the same day committed by a United States commissioner for that district to the Cook county jail, agreeably to the usual mode of process against offenders in the state of Illinois, upon his failure to furnish bail in the sum of ten thousand dollars, September 24, 1892, he was removed from the district where arrested to the western district of Missouri, the district of trial, and upon his application upon the same day for a reduction of the amount of bail fixed by United States commissioner Hoyne, the United States district judge for the western district of Missouri in vacation, reduced the same to the sum of three thousand dollars, and sent the following communication to the clerk of the United States district court at Kansas City:

"In the matter of the U. S. *v.* M. C. Curtis, you may approve recognizance for him in the sum of three thousand dollars with two sureties in addition to the principal, the same to be sufficient and approved by you." Rec. 25-30.

It will thus be seen that at the time Curtis made appli-

cation for a reduction of bail he had been removed from the district where found, arrested and committed to the district where the trial was to be had. If we are right in our contention that only those officers who have jurisdiction in the district where the offender is found and arrested are authorized to arrest and imprison or bail agreeably to state laws, then it follows that the district judge to whom application was made for a reduction of bail in this case was not authorized to bail Curtis agreeably to the laws of the state of Missouri relating to bail of offenders.

Again, Sec. 1014, R. S. U. S., provides simply that the preliminary proceedings in respect to offenders against the laws of the United States shall be agreeable to the laws of the states where such offenders are found.

In the case at bar the preliminary proceedings against Curtis took place in the State of Illinois before Commissioner Hoyne and were over and at an end at the time he applied through his attorneys to the district judge for a reduction of bail. He had been arrested in the city of Chicago, and upon his failure to furnish bail had been committed to the Cook county jail. It was not until after his arrest, commitment and removal from the city of Chicago to Kansas City, which was September 24, 1892, that he was bailed. The preliminary proceedings against him being over and at an end at the time he was bailed, the district judge was not authorized to bail him agreeably to the laws of the state of Missouri.

2. Even if the District Judge was authorized by sec. 1014 R. S. U. S., to bail Curtis agreeably to the laws of the State of Missouri, the Statutes of such state did not authorize the taking of the recognizance in suit by the clerk of the United States District Court.

If it should be held that the trial judge was authorized to bail Curtis, agreeably to the usual mode of process against offenders in the state of Missouri, we still insist that

the clerk of the district court had no authority to take the recognizance in suit.

Under Chapter 48 Revised Statutes of Missouri, 1889, entitled: "Criminal Cases, Practice and Proceedings In," and under Article 2 thereof, entitled: "Arrest, Preliminary Examination, Commitment and Discharge," we find these sections:

"Sec. 4040. *Bail. When to be taken.*—If the offense with which the prisoner is charged be bailable, and the prisoner offer sufficient bail, a recognizance shall be taken for his appearance to answer the charge before the court in which the same is cognizable, on the first day of the next term thereof and not to depart such court without leave, and thereupon he shall be discharged."

"Sec. 4049. *What courts may admit to bail.* Whenever any person shall be committed to jail on a warrant of commitment by any magistrate for a bailable offense the recognizance, with proper security, may be taken by the court or judge of the court having criminal jurisdiction, and in case of the absence of the judge of such court having criminal jurisdiction from the county such recognizance may be taken by any judge or justice of the county court or any judge of a court of record."

"Sec. 4050. *Recognizance, where deposited.* Whenever any prisoner shall be let to bail by any court it shall be the duty of the clerk of the court by which the prisoner was bailed immediately to transmit the recognizance *taken by such court* to the clerk of the court in which the party bailed is required to appear."

If the district judge was authorized to bail Curtis agreeably to the laws of the state of Missouri he would certainly have proceeded under Section 4049. Curtis had been committed to jail by a United States commissioner for a bailable offense, and under this section the district judge could have taken the recognizance for his appearance at the next term of the United States district court at Kansas City and discharged him. There is no provision whatever made under Article 2, Chapter 48, of the Revised Statutes of Missouri, 1889, for the taking of recognizances by clerks of

courts. A recognizance taken by a clerk of a court in Missouri would therefore be wholly unauthorized and void and it has been so held since the decision in this case in *State v. Caldwell*, 124 Mo., 509, where it was said:

"The bond in this case, though the bill of exceptions shows that it was introduced in evidence, does not appear to have been read nor is it preserved. But it appears very clearly that it was not taken or approved by the judge of the criminal court but was taken by the *clerk* of that court, and hence possesses no legal or obligatory force whatever. The sections which designate by whom bail may be taken and which make provision therefor are as follows:

Section 4049. 'Whenever any person shall be committed to jail on a warrant of commitment by any magistrate for a bailable offense the recognizance, with proper security, may be taken by the court or judge of the court having criminal jurisdiction, and in case of the absence of the judge of such court having criminal jurisdiction from the county such recognizance may be taken by any judge or justice of the county court or any judge of a court of record.'

Section 4123. 'When the defendant is in custody or under arrest for a bailable offense, the judge of the court in which the indictment or information is pending may let him to bail and take his bond or recognizance.'

Section 16 of the act creating the St. Louis criminal court, 2 Revised Statutes, 1889, page 2149, provides as follows: 'Whenever the judge of the St. Louis criminal court shall be sick or absent from the city, the judge of the St. Louis court of criminal correction may admit to bail any person charged with felony, who, under existing laws, may be entitled to be released upon bond.'

Section 4126 provides that on certain contingencies a sheriff may take bail, but no such provision is to be found regarding a *clerk of a court*.

Now, it is abundantly settled that a bond or recognizance taken in a criminal cause, before an unauthorized person, has no savor of validity about it. *State v. Randolph*, 26 Mo. 213; *State v. Nelson*, 28 Mo. 13; *State v. Ferguson*, 50 Mo. 409. Nor, where the bond or recognizance is taken before the *clerk of a court*, can it be afterwards validated by the entry by the court of a *nunc pro*

tunc order approving the bond? *Morrow v. State*, 5 Kan. 563. Consequently, even if Judge Normile approved the bond in question after the prisoner had been discharged by the unwarranted act of the clerk on the previous day, such approval, if given, was worthless and possessed no obligatory force, *even as a common law obligation. Commonwealth v. Roberts*, 1 Duv. (Ky.) 199; *Dickenson v. State*, 20 Neb. 72; *State v. Clark*, 15 Ohio 595; *Williams v. Shelby*, 2 Or. 144."

Under Article 5 of Chapter 48 of Revised Statutes of 1889, we find these sections:

"Sec. 4123. *Bail May Be Taken, When?* When the defendant is in custody or under arrest for a bailable offense, the judge of the court in which the indictment or information is pending may let him to bail and take his bond or recognizance."

"Sec. 4124. *Court to Fix Bail Before Arrest.* If the defendant is not arrested or in custody during the term at which an indictment for felony is returned, the court must fix the amount of bail required of the defendant, and the clerk must endorse the amount on the warrant; but if no order fixing the amount of bail has been made, the sheriff must present the warrant to the judge of the court, and such judge may thereupon indorse the amount of bail required; or if the judge is not in the county, the clerk may fix the amount of bail."

In the case at bar Curtis was under arrest and in custody, but no indictment had been returned against him at the time the recognizance in suit was taken. Section 4124 of Article 5, of Chapter 48, was therefore not applicable. These two sections only apply where there is an indictment or information pending against the defendant. Neither of these sections provide for the taking of a recognizance by the clerk of a court. There is no section of the Missouri statutes outside of the chapter relating to *habeas corpus* proceedings authorizing the clerks of courts to take recognizances in criminal cases.

3. The District Judge had the power to bail Curtis.

There was no occasion for the district judge to undertake to bail Curtis agreeably to the laws of Missouri, for it is a well settled principle of law that bail may be taken by any judge who has authority to issue the writ of *habeas corpus*.

Mr. Bishop, in his book on Criminal Procedure, Vol. 1, at Sec. 251, says:

"In general, all judges of the superior courts, and especially those who are authorized to issue writs of *habeas corpus*, whether sitting as a court or in chambers, may grant bail in criminal cases."

See also Am. Encyc. of Law, Vol, 2, p. 4.

Sec. 751 R. S. U. S. provides as follows:

"The supreme court and circuit and district courts shall have power to issue writs of *habeas corpus*."

Sec. 752 R. S. U. S. provides as follows:

"The several justices and judges of said courts, within their respective jurisdictions, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty,"

The district judge to whom application was made for reduction of bail, having power to issue the writ of *habeas corpus*, had the power to bail Curtis and a recognizance taken by him would have been valid because taken by a duly authorized officer. In the case at bar the district judge did not take the recognizance—he simply reduced the amount of bail and directed the clerk to take and approve the recognizance in suit and the sureties. The recognizance, as appears from the face thereof, was taken by the clerk of the United States district court at Kansas City and the *scire facias* writ *so recites*. The only officers who had authority to bail Curtis were the justice alloted to the eighth judicial circuit, the circuit judge thereof and the trial judge.

4. The recognizance in suit is void because the clerk who took the same acted without authority of law.

The clerk of the district court, as we have seen, acted without authority of law in taking the recognizance in suit.

If there is any principle of law well settled it is, that a recognizance to be valid *must be taken by an officer authorized by law to take the same.*

In Bishop on Criminal Procedure, at Sec. 264, it is said:

"A recognizance or bond must be taken before an officer duly authorized, and in its form and attending formalities it must fill the requirements of the statute and unwritten law of the particular state or it will be void."

In *State v. Randolph*, 22 Mo. 484, Judge Leonard, in defining a recognizance, said:

"It is, as we all know, an acknowledgment taken by some court or officer authorized by law to do so, of a debt due to the state, but suspended upon the condition that the accused appear in court at the appointed time and answer the alleged charge and do not depart without leave thereof. The *essentials of such a recognizance are that it be taken by a competent court or officer in a case existing before such authority, and for the performance of some act that the law allows to be secured in that way and in the form prescribed for that purpose.*"

Bouvier defines a recognizance as follows:

"It is an obligation of record entered into before a court or officers duly authorized for that purpose with a condition to do some act required by law which is therein specified.

In *Morrow v. State*, 5 Kansas, 341, it was held that an instrument in writing in the form of a recognizance in a criminal proceeding, but which was taken before the clerk of the district court, acknowledged by him and approved by him, was void, said clerk having no authority in the premises. In that case the court said:

"A recognizance is an obligation *of record* entered into before some court or officer *duly authorized for that purpose,*

with the condition to do some particular act. 2 Bouv. Law Dict. 428; 2 Bl. Comm. 341; 1 Chit. Crim. Law, 90. * *"

"It is admitted by counsel for defendant in error that the clerk of the district court has no authority to take or approve recognizances, and therefore it must be held that these supposed recognizances are void. * * * *"

"It may be urged that there was evidence showing that the court deputized the clerk to take these recognizances, but this the court could not do.

In *Clink v. Muskegon Circuit Judge*, 58 Mich. at p. 244, the court said:

"To make a good recognizance or obligation of record, the form prescribed must be pursued; therefore they may not be acknowledged before any others besides the persons appointed by the statutes, and the substantial forms of the statutes are to be observed. Bacon Case, 2 Dyer, 220; *Hall v. Winkfield*, Hob. 195; Toml. Law Dict. tit. 'Recognizance.' This is apparent also from the signification of the word; it being an obligation of record entered into before a court or officer *duly* authorized for that purpose. The statute requires that a recognizance of special bail may be taken before any justice of the supreme court, or any circuit judge, circuit court, commissioner, or clerk of any court of record. Notaries public are not authorized to take such recognizance. A paper writing in the form prescribed for special bail taken before a notary public is of *no binding force whatever.*"

In *Chinn v. Commonwealth*, (5 J. J. Mar. 30) it is said:

"We must interpret the *sci. fa.* as meaning that the recognizance was taken by the clerk out of court; or, in other words, by the clerk, and not, as it should have been, by the court. *Such a recognizance is insufficient.* To authorize a judgment against a cognizer, the *sci. fa.* should *recite a valid recognizance*, and consequently it must show that the *acknowledgment was made to an officer authorized by law to receive it.*"

See also *U. S. v. Goldstein's Sureties*, 1 Dill. 413, and *State v. Caldwell*, 124 Mo. 509 *supra.*

In *Dickinson v. State*, 20 Neb. 72, the court said:

"It was contended on the part of the defendant in error that as the action is founded on an obligation voluntarily

entered into and solemnly acknowledged, and for valuable consideration (liberty of the accused), etc., 'it is a binding obligation, whether the sheriff had authority to take it or not.' In other words, that conceding that the recognizance was taken without authority of law on the part of the officer taking it, still it is binding as a common law obligation and may be enforced. I have carefully examined the numerous cases cited by counsel on either side upon this proposition. I find two cases, and only two, in which it is squarely held that a recognizance, taken without authority in a criminal case, may be enforced as a common law bond: these are *The State v. Cannon*, 34 Iowa, 325, and *Dennard et al. v. The State*, 2 Ga. 137. The Georgia case cites three very old English and one South Carolina case; the former involving question of obligations between individuals, and the latter a bond for the support of a bastard. From these and other authorities it is well settled that in matters between individuals a bond or other obligation given by one to the other upon a lawful and adequate consideration, although such bond or obligation may be deficient in matter or form, or in the manner or time of its execution, acknowledgment, delivery, or filing, yet when it is sufficient to serve its beneficial purpose to the party at whose instance or for whose avail the same was given, it will be held binding according to its terms. But I do not think that these authorities apply to a case like the one at bar. Most of these cases arose upon appeal or forthcoming bonds, where, although a certain sum is fixed as a penalty to be forfeited upon the failure of the party for whose benefit the obligation is given to prosecute his appeal, etc., or to deliver the property, yet the real measure of damages—the amount for which judgment is rendered on such obligation—is the costs of suit, or the value, use of or damage to such property within the limit of the penalty named in such bond or obligation, and with no other reference to it. In such case the cause of action exists independent of the bond or recognizance, and its only office is to fasten liability upon the surety; but in the case of a recognizance for the appearance of an accused person to answer to an indictment, the obligation rests primarily and solely upon the paper itself; and the amount of the judgment is fixed and determined by the penalty named in the paper."

"The law does not favor penalties or forfeiture. When

exacted, the authority therefor should rest upon express law, and not upon construction or implication.

"*To hold that an unauthorized person may accept a recognizance running to the state which will bind the person entering into it, is to hold that one private unauthorized person may make another the debtor of the state, a proposition illogical in theory and dangerous in practice.*"

The court concludes the opinion by reviewing the authorities, and holds, both upon principle and the weight of authority, that a recognizance for the appearance of an accused person to answer to an indictment for felony, taken before and approved by an officer unauthorized by law, or where under the facts of the case the taking thereof is unauthorized by law, so that the same fails to be binding under the statute, is also void as a common law obligation.

5. The district judge could not deputize the clerk of the district court to take the recognizance in suit.

In *Frishe v. Commonwealth*, 6 Dana, 318, the court of appeals of Kentucky held that if the city judge had the right to recognize the defendant, he had no right to delegate that right to the marshal or to have directed him to recognize Rodes to appear in court for final trial, and that the recognizance was void.

In *Butler et al v. Foster*, Treasurer of Monroe, 14 Ala., 323, it was held that a judicial officer clothed with the power to admit to bail persons charged with criminal offenses, cannot delegate the power to another. In that case Dargan, J., said:

"The laws of this state do not permit the circuit judges to clothe the clerks of the circuit courts with authority to admit to bail in vacation those who may be imprisoned for alleged crimes; *for a judicial officer cannot delegate to another the power and authority by law intrusted to him. Although the circuit judge himself could himself have admitted McAllister to bail, he could not authorize the clerk of the circuit court of Monroe to do it.*"

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The court concludes the opinion by reviewing the authorities, and holds, both upon principle and the weight of authority, that a recognizance for the appearance of an accused person to answer to an indictment for felony, taken before and approved by an officer unauthorized by law, or where under the facts of the case the taking thereof is unauthorized by law, so that the same fails to be binding under the statute, is also void as a common law obligation.

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Sec.1000 R.S.U.S. provides that every judge or justice signing a citation or any writ of error or appeal shall, except in cases brought up by the United States or by direction of any department of the Government, in which case none is required, take good and sufficient security that the plaintiff in error shall prosecute his writ or appeal to effect, and if he fail to make his plea good shall answer all costs.

In O'Reilly v. Purington et al., 96 U. S., 724, it was expressly decided by this court that the security required by this section of the statutes must be taken by the judge or justice and that such power can not be delegated to the clerk.

This case, on principle, is decisive of the one at bar.

See also Hawkins v. R. R., 109 U. S., 106.

extent it is null and void. It follows, as the sheriff has no power to take the bond, *it is no more than so much blank paper, and the judgment rendered upon it is erroneous. It is therefore set aside, and this court, proceeding to render the judgment which the court below should have rendered, orders that said bond be quashed.*"

In *Commonwealth v. Roberts*, 1 Duvall, 199, it was held that a jailer had no authority to take bail, and a bail bond taken by him was not binding on the sureties, either as a statutory or common law obligatian. In that case the court *inter alia* said:

"It is insisted that the delivery from prison of the defendant and the enjoyment of his liberty by reason of said bond, is a valid consideration, and renders it obligatory. If the Commonwealth was precluded from a recapture and reimprisonment of the accused by reason of the bond there would be great force in this argument; but we apprehend such is not the case. Because the order of the circuit judge did not in terms direct who was to take the bond, therefore its legal import is, that when the prisoner shall execute such bond before the proper authorities, he was to be discharged. But had it directed in terms the jailer to take such bond, still it would not have vested him with any legal authority to do so, nor authorized the discharge of the prisoner from confinement. In other words, the jailer, not being authorized by law to act in such case, could not bind the Commonwealth; and although he discharged the prisoner by reason of said bond, yet Roberts was subject every moment to recapture and further imprisonment. Hence his discharge could be no valid consideration to uphold the bond.

"*It is not within the province of courts to invest persons with authority to take bonds and discharge prisoners from custody, from whom the Legislature have withheld such authority; nor should courts, by recognizing such acts to be binding on either party, contravene the policy of the Commonwealth in designating by law the officers authorized to bind her.* Not being bound by the acts of unauthorized persons, the state should not insist that the other party is bound, as that would destroy all mutuality."

Congress has not authorized clerks of the federal courts

to take recognizances. Such authority has been withheld. See Sec. 1014 R. S. U. S.

In *Jacquemine v. State*, 48 Miss., 280, a prisoner, arrested for murder, was refused bail and committed. On *habeas corpus* trial the sheriff was ordered to take bail, with sureties, subject to his approval, in the sum of $2500. The prisoner made default and forfeiture was taken against his sureties. On error it was held that the order to the sheriff to take bail and approve the sureties in such a case was without authority of law, and the forfeiture was reversed. In that case the court said:

"Jacquemine having been committed to jail to answer for the killing of Peter Rigrone, by a justice of the peace the question before the chancellor on the trial of the *habeas corpus* was as to the character of the 'killing,' felonious or not, and then as to its grade, murder or manslaughter. *He adjudged that the prisoner was entitled to bail and it was his plain duty, under the law, then and there to have taken the bail bond.* The committing magistrate must have supposed that the 'killing' was murder, otherwise he would have stated in his *mittimus* that the sheriff should release the prisoner from confinement on executing a bail bond, with sureties, in the prescribed amount.

"Our reading of the statutes accords with the construction of the *habeas corpus* act in force in 1852. *Pace v. State*, 52 Miss., 54. The fourth section of the act of June 11th, 1822, is essentially the same with Sec. 1409 of the code of 1871. In reference to the former the court said: 'The bond was not taken or approved by the judge making the order for bail but by the sheriff, who has no authority under the statute,' etc. In *Butler v Foster*, 14 Ala., 323, it was said that unless there be a statute authorizing it a court or judge cannot delegate authority to a sheriff to take a bail bond. * * *"

Because the chancellor himself did not take the bond and approve the recognizance of the prisoner and his sureties, but delegated the authority to the sheriff, we are of the opinion that the bail bond upon which the judgment was taken was invalid."

To the same effect in *State v. Caldwell*, 124 Mo., 509, *supra*.

In the light of these authorities we submit that there can be no question but that the recognizance in suit is absolutely void and of no binding force whatever.

From what has been said it follows that the *scire facias* in this case is insufficient to support the judgment rendered against plaintiffs in error.

IV.

Plaintiffs in Error not estopped to question validity of recognizance in suit.

It is conceded in the opinion of the court of appeals that there was no statute, state or federal, authorizing the clerk of the district court to take the recognizance in suit. In other words, that the clerk who took the recognizance, in doing so acted without authority of law. But it is said in the opinion, and the trial court so held, that the plaintiffs in error are estopped from questioning the validity of the recognizance in suit, and the reasons therefor are given by the appellate court in this language:

"We can conceive of no sufficient reason why the sureties should be permitted to question the validity of the recognninance, on the ground that it was acknowledged before the clerk, when it was so acknowledged at the request of the accused, and for the purpose of securing his immediate release, and when it was effectual for that purpose. We know of no reason why it was not competent for the accused to waive the formality of an acknowledgment of the bond and an examination of the sureties before the district judge, and having obtained his discharge by means of such a waiver, we know of no reason why he and his sureties should not be estopped from questioning the validity of the bond on that ground. In our judgment, the case is one in which the wholesome doctrine of estoppal may be properly invoked and applied. The course pursued in taking bail was adopt-

ed at the solicitation of the accused and for his advantage. The bond taken was accepted as sufficient by the district judge and the accused forthwith released. The contract made by the principal and his sureties was voluntary; it also rested upon an adequate consideration, to-wit: the release of the accused from imprisonment. Under these circumstances it would be trifling with the administration of justice to hold that the recognizance was invalid, because it was signed and acknowledged before the clerk. We accordingly hold that the testimony which showed that the recognizance was acknowledged before the clerk, at the request of the accused, was properly admitted. It did not tend to contradict any of the recitals contained in the record or in the writ of *scire facias*, and was not inadmissible on that ground. We furthermore hold that the sureties are estopped from questioning the validity of the bond upon the ground that it was entered into before the clerk, and so holding, the judgment of the circuit court is hereby affirmed." Rec. 44.

All the authorities agree that a recognizance or bond must be taken before an officer duly authorized, and in its form and attending formalities it must conform to the statute and unwritten law of the state or it will be void.

Bishop's Criminal Procedure, Sec. 264 and cases cited; see also *State v. Randolph*, 22 Mo. 480; *State v. Randolph*, 26 Mo. 216; *State v. Caldwell*, 124 Mo. 509; *State v. Morrow*, 5 Kas. 341; *Clink v. Muskegon Circuit Judge*, 58 Mich. 244; *Chinn v. Commonwealth*, 5 J. J. Mar. 30; *Frishe v. Commonwealth*, 6 Dana, 318; *Butler et al. v. Foster*, 14 Ala. 323; *Antonez v. State*, 26 Ala. 81; *Dickinson v. State*, 20 Neb. 72; *Commonwealth v. Canada*, 13 Pick. 86; *Commonwealth v. Roberts*, 1 Duvall, 199; *Jacquemine v. State*, 48 Miss. 280; *Commonwealth v. Otis*, 16 Mass. 198; *Commonwealth v. Loveridge*, 11 Mass. 337; *Blevin v. State*, 31 Ark. 53.

There can be no question but that a recognizance acknowledged before an officer not duly authorized by law is absolutely void.

In Bishop on Contracts, (enlarged edition) at Sec. 611, it is said:

"A contract is void when it is without any legal effect; voidable when it has some effect, but is liable to be made void by one of the parties or a third person."

Bouvier defines void as follows:

"That which has no force or effect."

In *Allis v. Billings*, 6 Metcalf, 417, "void" is defined as follows:

"The term *void*, as applicable to conveyances or other agreements, has not at all times been used with technical precision, nor restricted to the peculiar and limited sense as contradistinguished from 'voidable,' it being frequently introduced, even by legal writers and jurists, where the purpose is nothing further than to indicate that a contract was invalid and not binding in law. But the distinction between the terms 'void' and 'voidable,' in their application to contracts, is often one of great practical importance; and whenever entire technical accuracy is required, the term 'void' can only be properly applied to those contracts that are of no effect whatsoever; such are a mere nullity and incapable of confirmation or ratification."

Again, in Bishop on Contracts, at Sec. 188, it is said:

"Obviously a void contract is the same as none, and a voidable one may be so treated."

In *Clink v. Russell*, 58 Mich. 242, it was held that a recognizance must be entered into before a court or officer duly authorized; therefore, where an instrument purporting to be a recognizance is entered into before an unauthorized officer, it is of no binding force whatever.

In *Mattox v. Hightsue*, 39 Ind. 95, it was held that the separate deed of plaintiff, a married woman, was void and passed no title to her lands, and that she was not estopped to assert such claim, as a party can never be estopped by an act that is illegal and void.

In *Thomas v. Burrus*, 23 Miss. 550, the probate court had appointed a guardian for a minor, and while such appointment was unrevoked, appointed another who gave a bond with a surety, reciting that he had been appointed

guardian. In a suit on this bond against the surety it was held that the appointment of the last guardian was absolutely void, and that the surety might show the fact. The court said:

"It is certainly true that where a party makes a distinct and clear recital of any fact in a deed or other valid obligation, he will be estopped from denying the truth of such recital. *But this doctrine presupposes a valid legal obligation, and we do not know any authority, and reason is certainly against the proposition, that a party is estopped by any recital contained in an instrument, from showing that the instrument containing it is absolutely void.* In this case the probate court had no power to appoint Walker guardian, and if the order of appointment was void, it had no power to take or accept the bond, and having no such power the acceptance was a void act, and could not fix any liability on Thomas."

"While this court will, in all cases, hold guardians and sureties to a strict performance of their trusts, it must at the same time so administer the law as not to impose obligations and duties upon parties where none have been assumed according to law."

In *Glidden v. Strupler*, 52 Pa. St. 400, a married woman by agreement signed only by herself and without an acknowledgement, contracted to sell land; she received one year's interest and a small part of the purchase money. The purchaser took possession and made improvements, with her knowledge and encouragement. *Held*, that inasmuch as contracts of married women are nullities, neither the principle of estoppel nor compensation would prevent her recovering the land.

In that case, the court say, *inter alia:*

"The contract to convey being absolutely void because of incapacity, its ratification is equally forbidden unless by deed in the mode prescribed by the statute. No multiplication of deeds (and they are the most solemn acts *in pais* by which title can be transferred) will serve to ratify the void conveyance, unless made according to the statutory direction. Much less can express ratification by parol or expressions of satisfaction infuse life into that which has no vitality. How-

then, is it possible mere acts can be more efficacious that merely indicate the intention to transfer, which the writing has already expressed in terms explicit and emphatic? Acquiescence in, or acknowledgment of the invalid act, cannot be invested with greater virtue or vigor than the deed itself by which the act was done. The policy of the law which denies the capacity to do the act, as clearly denies the capacity to confirm it except in the legal mode." * * * "No right can spring from a void and prohibited contract, and the defendants had none."

In *Meriam v. R. R.*, 117 Mass. 241, it was said:

"The defendants insist that the claim of the plaintiff is inequitable, and that for that reason she is not entitled to the aid of a court of equity in its inforcement. But there is no equitable construction of a contract or duty, different from the legal one; and the same thing is true in the construction of statutes. 2 Story Eq. Jur., 1548. A court of equity has no more jurisdiction than a court of law to recognize and give effect to instruments which, by statute, are imperative. *Townsley v. Chapin*, 12 Allen, 476."

If the recognizance in suit is void, as it certainly is, for want of authority in the clerk to take the same, we are now unable, as we have always been, to see on what principle plaintiffs in error can be held liable. The doctrine of estoppel certainly has no application, and in the very nature of things can have none. If the recognizance is void, it is without legal effect, has no binding force whatever, and it can't be made binding on any legal principle known to the law.

For another reason the plaintiffs in error are not estopped to question the validity of the recognizance. It is indisputable law that the state can't be estopped by the unauthorized acts of its officers. *Pulaski v. State*, 42 Ark. 118; *Attorney General v. Marr*, 55 Mich. 445; *State v. Brewer*, 64 Ala. 287.

In Bishop's Contracts (Enlarged Edition), at Sec. 993, it is said:

"The government is never estopped, as an individual or private corporation may be, on the ground that the agent

is acting under apparent authority which is not real, the conclusive presumption that his powers are known making such consequence impossible."

If the government is not estopped from denying the validity of the recognizance in suit because the clerk who took the same acted without authority of law, then certainly plaintiffs in error ought not to be held estopped from so doing, for mutuality is an essential ingredient of estoppel.

In Bishop on Contracts (Enlarged Edition), Sec. 368, it is said:

"Estoppels must be mutual, both parties being bound or neither. A common illustration is where a married woman, under the common law disabilities, or a minor, not having capacity to make a lease of lands, executes one by indenture; here the lessee will not be estopped by his covenants, because his lessor is not. But this case might well be put on the ground that the lease is void. Another, from the old books, not admitting of being explained away, is that 'if a man takes a lease for years of his own lands by patent from the king, rendering rent, this shall not estop the lessee, as an indenture between common persons in such a case would do, because the king cannot be estopped, * * * and if he be not estopped, neither shall the lessee, because all estoppels ought to be mutual.'"

The government can act only through officers and agents, and the government is bound only where there is an actual authorization. The clerk who took the recognizance in suit, we have seen, had no authority to take the same, and the recognizance in suit is therefore not binding on the government. If not binding on the government, both upon principle and authority, it is certainly not binding on plaintiffs in error.

In *Reese v. United States*, 9 Wall. 13, the court, speaking through Mr. Justice FIELD, said:

"By the recognizance, the principal is in theory of the law committed to the custody of the sureties as to jailers of his own choosing, not that he is in point of fact in their custody, at least subjected or can be subjected by them to

constant imprisonment; but he is so far placed in their power that they may at any time arrest him upon the recognizance and surrender him to the court, and to the extent necessary to accomplish this, may restrain him of his liberty. This power of arrest can only be exercised within the territory of the United States, and there is an implied covenant on the part of the principal with his sureties, when he is admitted to bail that he will not depart out of this territory without their assent. There is also an implied covenant on the part of the government when the recognizance of bail is accepted that it will not in any way interfere with this covenent between them, or impair its obligation, or take any proceedings with the principal which will increase the risk of the sureties or affect their remedy against them."

In *Commonwealth v. Roberts*, 1 Duvall, 199, it was held that a jailer had no authority to take bail, and a bail bond taken by him was not binding on the sureties, either as a statutory or common law obligation.

In that case the court, *inter alia*, said:

"It is insisted that the delivery from prison of the defendant and the enjoyment of his liberty by reason of said bond, is a valid consideration and renders it obligatory. If the commonwealth was precluded from a recapture and reimprisonment of the accused by reason of the bond, there would be great force in this argument; but we apprehend such is not the case. Because the order of the circuit judge did not, in terms, direct who was to take the bond, therefore its legal import is, that when the prisoner shall execute such bond before the proper authorities he was to be discharged. But had it directed in terms the jailor to take such bond, still it would not have vested him with any authority to do so, nor authorized the discharge of the prisoner from confinement. In other words, the jailer, not being authorized by law to act in such case, could not bind the commonwealth; and although he discharged the prisoner by reason of said bond, yet Roberts was subject every moment to a recapture and further imprisonment. Hence his discharge could be no valid consideration to uphold the bond. It is not within the province of courts to invest persons with authority to take bond and discharge prisoners from custody from whom the legislature have withheld such authority; nor should courts, by recognizing such acts to be binding on

either party, contravene the policy of the commonwealth in designating by law the officers authorized to bind her. Not being bound by the acts of unauthorized persons, the state should not insist that the other party is bound, or that would destroy all mutuality."

As said by the supreme court of Nebraska in *Dickinson v. State, supra:*

"To hold that an unauthorized person may accept a recognizance running to the state, which will bind the person entering into it, is to hold that one private unauthorized person may make another the debtor of the state, a proposition illogical in theory and dangerous in practice."

The opinion of the court is squarely in conflict with *State v. Caldwell*, 124 Mo. 509; *Commonwealth v. Roberts, supra*, and also with *State v. Morrow*, 5 Kas. 341; *Clink v. Muskegon Circuit Judge*, 58 Mich. 244; *Chinn v. Commonwealth*, 5 J. J. Mar. 30; *Butler et al. v. Foster*, 14 Ala. 323; *Antonez v. State*, 26 Ala. 81; *Dickinson v. State*, 20 Neb. 72, and *Jacquemine v. State*, 48 Miss. 280.

Commonwealth v. Roberts, supra, is a well considered case; has never been criticised or overruled, and the reasoning thereof seems to us unanswerable.

Littleton v. State, 46 Ark. 413, so much relied on by counsel for defendant in error in his brief in the court of appeals, and cited in the opinion of the court of appeals as an authority, is not in point and really has no application to the case at bar. The facts of that case, as stated by the court, are these:

"Upon a warrant issued by a justice of the peace of Yell county for the arrest of William Easley for a misdemeanor committed in Yell, the sheriff of that county arrested the accused in Logan county and brought him back to Yell county and there took from the appellants a bail bond for the defendant's appearance before the justice at a day specified in the bond, and discharged him. The defendant failed to appear before the justice as required by the conditions of the bond, and the state brought this action by complaint and summons in the circuit court of Yell county against the bail. The bond was not signed by the defendant. The de-

fenses to the action were: First—That the circuit court had no jurisdiction, the forfeiture of the bond being in the justice's court. Second—Duress—That the arrest in Logan county by the sheriff of Yell, and his subsequent custody of the defendant in Yell, were illegal and the bond was void for duress."

It will thus be seen that no question was made as to the authority of the sheriff to bail prisoners and take recognizances. The legislature of Arkansas had conferred such authority on the sheriff. The point made was that Easley was not in legal custody of the sheriff of Yell county at the time the recognizance for his appearance was taken by the sheriff and for that reason the recognizance was void.

The court held that it was no defence to the action on the recognizance against the bail, that the accused was illegally in custody at the time it was taken, and in doing so recognized in unmistakable terms, the principle that a recognizance taken by an officer without authority of law to take the same is absolutely void, the very principle for which we are contending. That case is really an authority against the validity of the recognizance in suit, for in the opinion the court say:

"We are aware that there are cases upon bail bonds in which the sureties have received the benefit of duress of the principal, but an examination will show that in most of them there was a fundamental defect in the proceedings which led to the arrest that in effect rendered it and the bond taken in pursuance of it void, as in *Fisher v. Shattuck*, 17 Pickering, 252, where the magistrate requiring the bond had no jurisdiction of the subject matter, and hence no authority whatever. The same court in later cases, without inconsistency, refused to receive the plea of duress of the principal from a surety. *Robinson v. Gould*, 11 Cush. 55; *Bowman v. Hiller*, 130 Mass. 153."

"The case of *Blevins v. State*, 31 Ark. 53, is of the same class as *Fisher v. Shattuck*. There the sheriff of Pope county, under process issued to him from Pope, made an arrest and took bail in Conway county. The court held that in Conway county the sheriff of Pope had no official capacity, and that a bond taken there by him was no more

than a bond executed by a private citizen, and was for that reason void."

In the case at bar it is not claimed that the accused was in illegal custody at the time the recognizance was taken, and that the same is void for duress. There is no such question in the present case, and for this reason, *Littleton v. State*, *supra*, has no application. Our contention is, and has always been, that the recognizance is void because the clerk who took the same had no authority to take recognizance and *Blevins v. State*, 31 Ark. 53, cited in *Littleton v. State*, is an authority in support of our contention.

Jones v. Gordon, 82 Ga. 570, cited by the court of appeals in its opinion, has no application to the case at bar. The question in the present case is one of authority of the clerk to take recognizance. Our contention is that clerks of federal courts have not been authorized to let to bail in any case or under any circumstances, and for this reason recognizances taken by them or entered into before them are absolutely void and of no binding force whatever. The validity of the recognizance in suit is questioned on this ground, and not, as in the Georgia case, on the ground that the officer who took the same had no jurisdiction. In the Georgia case, there was no question but that justices of the peace had authority to let to bail. The point made was, that as the bail bond was taken before a magistrate in a different county from that in which the crime was committed, the magistrate who took the bond from the defendant and his sureties, had no jurisdiction. The court held that inasmuch as the accused had voluntarily entered into the recognizance before a magistrate having authority to let to bail, thereby securing his release from custody, and made no question at the time as to the jurisdiction of the magistrate, the validity of such recognizance could not afterwards be questioned on the ground that said magistrate had no jurisdiction. That case was decided upon the familiar principle that objection to the jurisdiction of a court must be made at the proper time, and that if a party voluntarily submits his person to the jurisdiction of

a court, he will not be heard thereafter to object on that ground.

In *State v. Wenzel*, 77 Ind. 428, the point was made that the accused was in illegal custody at the time the recognizance in suit was taken by the circuit court. In disposing of this point the court, *inter alia*, said:

"We are not willing to hold that one against whom an accusation of felony has been formally and properly lodged, can voluntarily enter into a recognizance in a court of general jurisdiction, and afterwards escape the consequence of a default upon the ground that a ministerial officer had illegally arrested him. To hold with the appellee would be to adjudge that a court of competent jurisdiction must, in cases where a party in the custody of the sheriff comes in and asks to enter into a recognizance, before granting the request, stop and enquire by what manner the accused came into custody. We are clear that the court is not bound to do any such thing, but has a right to presume that the accused is properly within its jurisdiction. If the accused controverts the legality of the means by which he was brought into court, he must make known his objection, and not by affirmative act, submit to the authority of the court and ask of it the privilege of giving bail. As the court possessed plenary jurisdiction of the subject matter, and as the accused, voluntarily and without objection, submitted his person to the jurisdiction of the court, and, in acknowledgment of the authority, asked that his recognizance be accepted and made part of the record, it must be held that the jurisdiction of the court was in all respects complete and perfect."

"There is still another phase of the case. The accused was in person present in open court tendering his recognizance, and it then became necessary for the court to determine whether it had jurisdiction to receive the bail proffered. The question of jurisdiction was, therefore, one for determination, and, as it was determined, the correctness of that decision cannot be impeached in this collateral manner. It has been again and again decided that the judgment of an inferior court upon its own right to take jurisdiction cannot be collaterally questioned; and there is much stronger reason for applying the rule to courts of general superior jurisdiction."

The distinction between the case at bar and *Jones v. Gordon, supra*, is perfectly obvious. The release from custody of the accused was a sufficient consideration for the recognizance in that case, because the magistrate who took the recognizance had authority to let to bail, and therefore bound both the state and the bail in taking the recognizance. The magistrate being a judicial officer, in taking the recognizance necessarily decided that he had jurisdiction, and his right to take jurisdiction could not be collaterally questioned. See *State v. Wenzel, supra.*

Weldon et al v. Colquitt, (Governor) 62 Ga. 449, was a *scire facias* proceeding to have execution on a recognizance. A *scire facias* was issued and served upon the bail. The bail pleaded to the *scire facias*, first, that the bond was illegal and void because made and delivered on the Sabbath day; and secondly, that both the judgment of the magistrate requiring the bond and the bond itself were illegal and void, because there was no necessity or other good reason for holding the court of enquiry on the Sabbath day, and the holding of the same was not a work of necessity or charity, but was an exercise of the ordinary business or calling of the magistrate.

The court held the order or judgment of the magistrate requiring bail void, because made on Sunday, but held the bond valid and binding upon the bail and gave the reason for so holding in this language:

"The warrant and arrest were, however, legal. Taylor was in lawful custody and was as effectually a prisoner and deprived of his liberty as if he had been in jail. Had he been in jail he might have been legally delivered on bail, though it was Sunday. * * *" 55 Ga. 241.

"Though a void judgment be some part of the inducement to a contract, yet, if the contract would be valid and obligatory had no judgment been rendered, the contract is not made void by the nullity of the judgment."

In that case the court held the recognizance valid and binding on the sureties because the magistrate who took the

same had authority to let to bail on Sunday *in the absence of a judgment requiring bail to be given*. The release from custody was a sufficient consideration for the recognizance in that case, because the magistrate who took the recognizance had authority to take the same and in doing so bound both the state and the bail. *Weldon et al v. Colquitt.* (Governor) *supra*, therefore has no application.

As to the other cases cited by the court of appeals in its opinion it is sufficient to say that recognizance given in criminal cases were not involved therein, and that the questions raised therein were simply *irregularities* in the proceedings. In the case at bar the validity of the recognizance in suit is questioned because of a fundamental defect therein, viz: want of authority in the clerk to take the same.

The point of the court of appeals in the opinion that the release of the prisoner from custody is a sufficient consideration for the recognizance where the recognizance given is void for want of authority in the officer to take the same, seems never to have been deemed worthy of consideration by the courts in any of the numerous cases cited by us, with the exception of *Commmonwealth v. Roberts, supra.* In that case the point was seriously considered and disposed of on principle as not well taken. The release of the accused in this case from custody upon taking the recognizance was not a sufficient consideration therefor, because the government was not bound, the clerk having no authority to take the recognizance. The government can only be bound by the acts of authorized officers.

We confidently submit that there is not an authority to be found which holds that bail are estopped to question the validity of a recognizance taken by an officer who had no authority to take recognizance If there is an authority which even lends any support to the opinion of the court of appeals, it has not been cited in the opinion.

In the opinion it is also said:

"We know of no reason why it was not competent for the accused to waive the formality of an acknowledgment of

the bond and an examination of the sureties before the district judge, and having obtained his discharge by means of such waiver, we know of no reason why he and his sureties should not be estopped from questioning the validity of the bond on that ground." (Rec. 44.)

The court of appeals seem to forget that an instrument to be a recognizance must be acknowledged before an officer duly authorized for that purpose. An acknowledgement before a duly authorized officer is absolutely essential. Without such an acknowledgement an instrument is not a recognizance. If the acknowledgment is waived, the instrustrument is not a recognizance, and if not a recognizance, then a *scire facias* proceeding thereon can't be maintained. There could, therefore, be no waiver of the acknowledgment by the accused before the district judge.

It is also said in the opinion, after a statement of the circumstances under which the recognizance in suit was taken:

"Under these circumstances it would be trifling with the administration of justice to hold that the recognizance was invalid, because it was signed and acknowledged before the clerk." It is certainly not trifling with justice in a legal sense, for courts to so administer the law as not to impose obligations and duties upon parties where none have been assumed according to law. To hold plaintiffs in error liable on the recognizance in suit, is to disregard the authorities and well settled principles of law, which should control and govern this court in a correct decision of this case.

V.

Parol evidence is illegal and incompetent (third and fourth assigned errors) in a scire facias proceedings on a recognizance.

So far but one assigned error has been discussed and that, we have seen, arises on the record proper. The other

errors assigned are preserved by bill of exceptions and relate to the admission of evidence by the trial court against timely objections made by plaintiffs in error, and also to the action of such court in refusing a certain declaration of law requested by plaintiffs in error. These assigned errors will now be briefly noticed.

On the trial of this case the trial court permitted defendant in error, against the objection of plaintiffs in error, to prove by parol evidence that M. C. Curtis, the accused, and his attorneys, on the 24th day of September, 1892, appeared before the Hon. John F. Philips, judge of the district court of the United States for the western district of Missouri, in Kansas City, at chambers, and asked that the amount of bail theretofore fixed by Philip A. Hoyne, United States commissioner in the city of Chicago, at ten thousand dollars, be reduced and that the sufficiency and approval of the sureties on the recognizance in suit were referred to the clerk of the United States district court at Kansas City, Missouri, at the instance and with the consent of said Curtis and his attorneys. (Rec. 30.) The admission of this evidence by the trial court against the objection of plaintiffs in error, and the decision of the circuit court of appeals holding such evidence admissable, are the third and fourth errors assigned by plaintiffs in error (*supra*, page 13), and it is this parol evidence, given in the case over the objection of plaintiffs in error, that has enabled the circuit court of appeals to invoke and apply the doctrine of estoppel to the prejudice of plaintiffs in error; for the circuit court of appeals, in deciding this case, lay great stress on the fact that the recognizance in question was acknowledged before the clerk of the district court at the request of the accused. This fact cannot affect this case, as will be seen by an examination of the authorities hereinbefore cited. (Div. IV. of Argument, *supra*.)

Besides, this fact appears only from parol evidence given at the trial, which was clearly illegal and incompetent in such a proceeding as the one at bar. In deciding this case

the circuit court of appeals has given consideration to such fact, shown, as it was, by parol evidence, to make out a case against plaintiffs in error, and in so doing, we think, has committed error, as did also the trial court in admitting such parol evidence.

The circuit court of appeals in its opinion say:

"Therefore, when the defendants named in a writ of *scire facias*, by way of defense thereto, deny any of its recitals, it is incumbent on the plaintiff to verify the same by producing the record and files, and the facts in question cannot be otherwise proven unless the record and files have been lost or destroyed."

It is well settled that a *scire facias*, to have execution on a recognizance given in a criminal case, is not the exclusive remedy. A suit by petition and summons is another. *Littleton v. State*, 46 Ark. 413; *U. S. v. Insley*, 54 Fed. Rep. 221.

Before commencing proceedings to have execution on a recognizance, it should, therefore, be determined by the state whether the record and files of the court make a case against the sureties on the recognizance. If the record and files are complete and make a case against the sureties, then a *scire facias* proceeding can be commenced and successfully maintained. But if some of the records and files of the court are missing, so that the records and files remaining do not make a case against the sureties, and a resort to parol evidence will be necessary to make a case, suit on the recognizance should be commenced by petition and summons, that parol evidence may be introduced; but such evidence is incompetent in a suit commenced by *scire facias*. It can't be that the state can adopt a *scire facias* proceeding, which is purely a record proceeding to have execution on a recognizance, and in the midst of the trial, finding that the records and files of the court fail to make a case against the defendant, introduce parol evidence to make out a case. The authorities hold that the record must be complete and that parol evidence is inadmissible in such a proceeding.

In *U. S. v. Stevens*, 16 Fed. Rep., at page 105, Judeg Hammond thus states the nature of a proceeding by *scire facias:*

"The very nature of a proceeding by *scire facias* is essentially of a record character. The writ is founded upon a record, and recites nothing that is not of record in a court of justice (*State v. Robinson*, 8 Yerg., 370; *State Bank v. Vance's Adm'r.*, 9 Yerg., 472; *Nicholson v. Patterson*, 2 Hump., 448; *Hayes v. Cartzwright*, 6 Lea., 143; *United States v. Evans*, 2 Fed. Rep., 147, and cases therein cited, at page 150; *Pugh v. State*, 2 Head., 227); nor can the writ issue on a forfeited recognizance or bond not properly taken or filed in and for appearance to the court in which the *scire facias* proceeding is had; (*State v. Gassaway*, 11 Hump., 203; *State v. Arledge*, 2 Sneed, 229); nor can the *scire facias* contain matter not of record, and it must pursue the record in all material matters. (*Scott v. State*, 1 Head, 433; *State v. Grigsley*, 3 Yerg 280; *White v. State*, 5 Yerg., 183; *Dillingham v. United States*, 2 Wash., C. C., 422.)"

In *Veosha R. R. Co. v. Sperry*, 3 Bliss., 311, Blodgett, U. S. District Judge, said:

"A *scire facias* is a proceeding or writ founded on some matter of record, and the rule is, without exception so far as my examination goes, that the record must be complete in itself and no testimony is admissible *aliunde* for the purpose of making out a case. The object of the proceeding, though strictly statutory, is to vivify or vitalize what otherwise would lie dormant upon the record."

In *Dillingham v. U. S.*, 2 Wash., at page 427, Mr. Justice Washington said:

"For we hold it to be essential to a breach of the condition upon which the forfeiture is to arise, that the party who is recognized to appear should be solemnly called before his default is entered; and if default can be proved by the parol evidence of the magistrate before whom the appearance was to be, *which we very seriously question*, it should clearly be proved that the party was called and warned and neglected to appear."

In *U. S. v. Rundlett*, 2 Curtis, at page 45, Curtis, J. said:

"One of these rules requires the principal cognizor called and his default entered, and the legal effect of the condition is such that it is not broken by non-appearance generally, to be proved by any evidence, but only by non-appearance in answer to a call, to be proved by an entry made on the minutes of the magistrate and returned by him as part of the proceedings."

In *People v. Kane*, 4 Denio, at page 535, a *scire facias* case, we find this language:

"Whatever is properly matter of record and proceeded on as such must exist and can be proved in that form alone. The law will not permit it to rest partly in record and partly in parol, but it must be made complete in its proper form. The gist of an action being matter of record, it must be that alone. There is no form of action the gravamen of which, properly speaking, can be in part matter of record or specialty and the residue matter *in pais*."

The authorities just cited are conclusive of the proposition that the trial court erred in admitting parol evidence that the recognizance in suit was acknowledged before the clerk of the United States district court at the request of Curtis and his attorneys, and that the sufficiency and approval of the sureties on such recognizance were referred to said clerk at the instance and with the consent of Curtis and his attorneys; and that the circuit court of appeals erred in holding such parol evidence admissible and in giving consideration thereto in a decision of this case which resulted in an affirmance of the judgment in this case.

VI.

The recognizance in suit was inadmissible in evidence.

The trial court erred (fifth assigned error) in admitting in evidence, against the objection of plaintiffs in error, the recognizance in question because the same appeared on its face to have been taken and acknowledged before the clerk of the district court of the United States, as did also the circuit

court of appeals err in holding such recognizance admissible. The authorities cited under Division III of our brief of argument are conclusive of the proposition that such recognizance is void, and therefore inadmissable in evidence.

VII.

The trial court erred (sixth assigned error) in refusing declaration of law requested by plaintiffs in error to the effect that on the pleading and evidence the judgment must be for plaintiffs in error, as did also the circuit court of appeals in holding such declaration properly refused.

At the conclusion of the evidence in this case plaintiffs in error requested the trial court to give this declaration of law.

"The court declares the law to be that upon the pleadings and evidence in this case, the finding and judgment must be for the defendants, Ward and Hunt." Rec. 31.

This declaration of law was refused by the trial court and an exception to such court's refusal was duly taken by plaintiffs in error. (Rec. 31.) If it be true, as we have shown under Div. III of our argument, *supra*, that the recognizance in controversy is void and of no binding force whatever, the trial court certainly erred in not giving this declaration of law as requested.

Because of the errors committed by the trial court and the circuit court of appeals in a decision of this case, we respectfully ask that the judgments rendered herein be reversed.

HUGH C. WARD,

Attorney for Plaintiffs in Error.

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Office Supreme Court, U. S.
FILED
APR 1 1897
JAMES H. McKENNEY
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

ROBERT H. HUNT and HUGH C. WARD, plaintiffs in error,
v.
THE UNITED STATES.
No. 230.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

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Because of the errors committed by the trial court and the circuit court of appeals in a decision of this case, we respectfully ask that the judgments rendered herein be reversed.

HUGH C. WARD,
Attorney for Plaintiffs in Error.

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Office Supreme Court, U. S.
APR 1 1897
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

ROBERT H. HUNT and HUGH C. WARD, plaintiffs in error, v. THE UNITED STATES. } No. 230.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

ROBERT H. HUNT AND HUGH C. WARD, plaintiffs in error, v. THE UNITED STATES. } No. 230.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

In consideration of the present state of the appropriations for the Department of Justice, this brief will be made very short. Fortunately the main reliance can be placed upon the able and careful opinions of the lower courts, which are incorporated in the record and are also to be found in the official reports. (*United States* v. *Hunt*, 61 Fed. Rep., 795; *Hunt* v. *United States*, 19 U. S. App., 683; 27 id., 287.)

STATEMENT OF THE CASE.

This is an action of *scire facias* on a forfeited recognizance.

One Millard C. Curtis was arrested in Illinois upon the charge of embezzlement as cashier of the American National Bank of Kansas City, Mo. The record in the original criminal proceedings shows that he was sent to the western district of Missouri in pursuance of a warrant granted by Judge Gresham, September 23, 1892. (Record, pp. 18–23, 28.)

The next paper to be found in the original record seems to have been the recognizance, which bears date September 24, 1892, is signed and sealed by Curtis and by the present plaintiffs in error, and reads as follows: (pp. 23–4):

> UNITED STATES OF AMERICA,
> *Western District of Missouri, City of Kansas City, ss:*
>
> Be it remembered, that on this 24th day of September, A. D. 1892, before me, a clerk of the U. S. district court, for the said western district of Missouri, personally came M. C. Curtis, Robert H. Hunt and Hugh C. Ward, and jointly and severally acknowledged themselves to owe the United States of America the sum of three thousand dollars, [etc.].
>
> Taken and acknowledged before me on the day and year first above written.
>
> JOHN M. NUCKOLS,
> *Clerk U. S. Dist. Court.*

Done by order Hon. John F. Philips, judge U. S. dist. court for west. dist. of Missouri, hereto attached.

The order thus stated to be attached was as follows (p. 27):

> KANSAS CITY, MO., *Sept. 24th, 1892.*
>
> JOHN M. NUCKOLS,
> *U. S. Dist. Clerk:*
>
> In the matter of The U. S. *vs.* M. C. Curtis, you may approve recognizance for him in the sum of three thousand dollars, with two sureties in addition to the principal, the same to be sufficient and approved by you.
>
> JNO. F. PHILIPS, *Judge.*

The subsequent proceedings are immaterial for the purposes of the present brief, as the point now relied upon by plaintiffs in error is that the recognizance is void because it was taken before the clerk instead of before the judge.

ARGUMENT.

I.

The writ of error should be dismissed, because the case is one arising under the criminal laws.

The Circuit Court of Appeals Act of March 3, 1891, c. 517, § 6, provides as follows as to the finality of judgments and decrees of the circuit courts of appeals:

> And the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, *and under the criminal laws* and in admiralty cases.

(1) Is this *scire facias* anything more than an incidental proceeding in the course of the criminal prosecution of *United States* v. *Curtis*, thus being itself of a criminal character?

The learned counsel-defendant says that this "is purely a record proceeding to have execution on the recognizance." (Brief, p. 57.) The authorities are in conflict as to whether a writ of *scire facias* upon a forfeited recognizance, although conceded to have some of the attributes of an independent action, is in essence anything but an incident of the proceeding in which the recognizance was taken. The confusion in the authorities on this subject is a natural consequence of the somewhat anomalous character of the writ. Mr. Bacon describes it as follows (8 Bacon's Abridgement, Phila. ed., 1852, p. 598):

> A *scire facias* is deemed a judicial writ and founded on some matter of record, as judgments, recognizances, and letters patent, on which it lies to enforce the execution of them or to vacate or set them aside.
>
> And though it be a judicial writ, or writ of execution, yet it is so far in nature of an original that the defendant may plead to it, and it is in that respect considered as an action. * * * But for some purposes it is only considered as a continuance of the original action.

Of *scire facias* on recognizances he says (p. 605):

> Recognizances and statutes are considered as judgments, being obligations solemnly ackowledged and entered of record, and the *sci. fa.* on those is a judicial writ and the proper remedy the conusee hath.

As it is in the nature of an execution, the writ is as a general rule issued only by the court in which the record lies, although there may be circumstances under which it can issue in more than one county, as in the English Court of Common Pleas (p. 622):

> But on a recognizance in C. B. the *sci. fa.* may be laid in the county where the caption was, or in Middlesex where it is filed, for it is a record by the caption, and becomes immediately obligatory, and therefore may be brought there; and it is also filed at Westminster, in C. B., and there remains of record.

In *Winder* v. *Caldwell*, 14 How., 434, 443, Mr. Justice Grier said:

> A *scire facias* is a judicial writ, used to enforce the execution of some matter of record on which it is usually founded; but though a judicial writ, or writ of execution, it is so far an original that the defendant may plead to it.

This court decided at an early date that *sci. fa.* on a judgment is but "a continuance of the original action." (*McKnight* v. *Craig's Administrator*, 6 Cranch, 183, 187.) This ruling is in accordance with the authorities elsewhere, although there is a conflict of authority when the writ is founded upon a recognizance. In *United States* v. *Payne*, 147 U. S., 687, 690, this court expressed the opinion that a *scire facias* upon a recognizance "is as much an original cause as an action of debt upon a recognizance or a bill in equity to annul a patent." The cases cited in support of the proposition are not directly in point, and that the authorities were in conflict was apparently not brought to the attention of the court. A

scire facias would seem clearly to be a "cause" within the meaning of the statute then under consideration, so that the remark quoted was *obiter*. If this court regards the question as still open for consideration, the following authorities seem to deserve attention.

The Supreme Court of Pennsylvania from very early times has held all proceedings on recognizances to be of a criminal nature and not original actions. (*Respublica* v. *Cobbet*, 2 Yeates, 352, 362; S. C. 3 Dall, 467, 475; *Commonwealth* v. *County Commissioners*, 8 S. & R., 151, 154–5.) These decisions have been followed in Texas. (*Gay* v. *State*, 20 Tex., 504; *State* v. *Norvell*, 53 Tex., 427.) In Louisiana the corresponding proceeding upon a forfeited bail bond has always been regarded as criminal in nature. (*State* v. *Cassidy*, 7 La. An., 273, 276; *State* v. *Williams*, 37 Id., 200; *State* v. *Cornig*, 42 Id., 416.) In *Wood* v. *People*, 16 Ill., 171, 172, Treat, C. J., said that a *scire facias* upon a recognizance "is but a continuance of the previous proceedings in the case," and ascribes to this principle the familiar rule dispensing with the declaration in such a proceeding; a rule which exists in the State of Missouri, where the present controversy arose. (*State* v. *Rogers*, 36 Mo., 138, 140; *State* v. *McElhanney*, 20 Mo. App., 584, 586.) In a later case in Illinois, however, the proceeding was said to be "not of a criminal character." (*Peacock* v. *People*, 83 Ill., 331, 332.)

Missouri is one of the States which hold that a *scire facias* upon a recognizance given in a criminal proceeding is itself part of that proceeding. (*State* v. *Heed*, 62

Mo., 559, 560; *State* v. *Peyton*, 32 Mo. App., 522, 527; *State* v. *Hoeffner*, 124 Mo., 488; *State* v. *Murmann*, id., 502.) In the case last cited Gantt, P. J., said (pp. 507–8):

> A recognizance is a matter of record, and the *scire facias* is the process for carrying it into execution. And while it is sometimes denominated a suit, it is only so to the extent that the defendant may plead to it. It is *judicial* rather than original in its nature, for when final judgment is rendered, the whole record is conceded as one.
>
> A *scire facias* upon a recognizance in a criminal prosecution is not a civil proceeding so as to entitle a party to remove such a cause to a federal court under the judiciary act and the Constitution of the United States, *Respublica* v. *Cobbet*, 3 Dallas (Penn.), 467. The universal rule at common law was that recognizances must be prosecuted in the courts in which they were taken. The cognizors, by entering into a recognizance, submitted themselves to the jurisdiction of the court, and a forfeiture was an additional judgment.

Whatever might be the rule in cases coming from States which treat *scire facias* as an independent civil action, it is submitted that, being a common law proceeding, it should not be regarded as original when arising in the State of Missouri. (Rev. St., § 914.)

(2) However this may be, it is clear that the case arises under the criminal laws within the meaning of the Circuit Court of Appeals Act. There is no power in a Federal court or officer to take a recognizance in a criminal case except under the provisions of § 1014 of the Revised Statutes. This section adopts the procedure of

the State in which the proceedings are had. It therefore, to this extent, adopts the provisions of the Code of the State of Missouri. The United States bases its writ upon the provisions thus made part of the criminal laws of the United States, and the defence to the writ consists of claims that, by a proper construction of those laws, the recognizance was void. There is no similarity between this case and that of *United States* v. *American Bell Telephone Co.*, 159 U. S., 548, relied upon by the plaintiffs in error.

II.

If the writ is not dismissed the judgment must be affirmed.

It does not seem necessary to decide whether or not parol evidence is admissible in *scire facias*. If the *scire facias* is not an original action, but a mere writ of execution based upon the record, the exclusion of parol evidence to supplement the record would be in accord with the theory of the proceeding; but upon this theory it would be a criminal proceeding, not reviewable by this court upon writ of error (*supra*). If *scire facias* is an original proceeding, like an action in debt, there is no apparent reason why the record could not be supplemented by parol evidence.

Without setting forth the arguments which are presented in the opinions of the lower courts in language which could not be improved upon, we shall endeavor to supplement these opinions with a few remarks upon the following points: (1) that the parol evidence, if admissible, makes a complete estoppel upon the plaintiffs in error; (2) that if the parol evidence is all excluded,

and the case tried upon the record alone, the record is supported by sufficient presumptions to establish its validity; and (3) that by the better opinion (although this is conceded to be contrary to the greater number of authorities upon recognizances) the paper is good as a common law obligation, even if the clerk had no authority by statute to take it.

(1) It is well settled that defendants, even in criminal cases, can estop themselves from taking objections of this kind, even though based upon constitutional rights. (*Reynolds* v. *United States*, 98 U. S., 145, 160; *United States* v. *Gale*, 109 U. S., 65; *United States* v. *Loughery*, 13 Blatchf., 267; *People* v. *Guidici*, 100 N. Y., 503, 508; 1 Bish. New Crim. Proc., § 1205.)

The parol evidence as to estoppel is set forth at pp. 25–6, 30 of the record. It appears that the prisoner's attorneys applied to Judge Philips in Chambers on September 24, 1892, to reduce the bail, and succeeded in getting it reduced to $3,000; that they "requested the judge to make an order for the clerk of the court to take the acknowledgment of the bond, so that we could secure the release of Curtis in the absence of the judge;" that they got the order accordingly and persuaded the clerk to take the bond in accordance with the order, the judge not being in court; that neither they nor the prisoner made any objection to his imprisonment; and that neither they nor the prisoner made any objection to the clerk's authority.

The estoppel is not weakened by the fact that one of the sureties is himself learned in the law, as shown by the brief which he has filed here.

(2) If, however, we throw out all the parol evidence, we have simply the Illinois proceedings and the recognizance itself. It would appear even that the order from the judge to the clerk was not duly made part of the record, and should perhaps be thrown out of consideration.

Among the facts which thus disappear from the case is the fact that the recognizance was not taken in a *habeas corpus* proceeding—a fact which is learned from the oral testimony of Curtis' original counsel (p. 30).

But, at least if the proceeding were in *habeas corpus*, the clerk would have undoubtedly power under the Missouri laws to take the recognizance. Taking a recognizance is a part of his duties as recognized by the fee bill (2 Missouri Rev. St., 1889, § 4986), and in *habeas corpus* the power is expressly given to him (§ 5386).

That all necessary steps had already been taken is presumed from the recognizance itself. (*United States* v. *Wallace*, 46 Fed. Rep., 569; *Bodine* v. *Commonwealth*, 24 Pa. St., 69, 71.) This is as well settled in Missouri as elsewhere. (*State* v. *Rogers*, 36 Mo., 138.) In the Bodine case Judge Woodward said:

> But the record shows that it was taken in term time, and we presume it to have been the act of the court, the clerk being their instrument only. *Omnia præsumuntur rite esse acta.*

This presumption is in accordance with the general rule as to presumptions from official acts. (See *Keyser* v. *Hitz*, 133 U. S., 138, 146; *Clark* v. *Wooster*, 119 U. S., 322, 326; *Hoyt* v. *Hammekin*, 14 How., 346, 350; *Butler* v. *Maples*, 9 Wall, 766, 777–8; *Bush* v. *Kentucky*, 107 U. S., 110, 121.)

It may be suggested that the clerk has no power at all to take bail under § 1014 of the Revised Statutes; that, while the form of the recognizance may be taken from the Missouri practice, a prisoner can be bailed only by one of the officers expressly named in the Federal statute; and that a judicial function can not be delegated to a clerk. (*O'Reilly* v. *Edrington*, 96 U. S., 724.) In that case an appeal was dismissed because the bond was approved by the clerk, although this was pursuant to an order of the court. There can be no doubt, however, that the oath may be administered or acknowledgment taken by the clerk in the presence of the court, nor that the act is presumed to be done in the court's presence. (*United States* v. *Evans*, 2 Fed Rep., 147, 152; *United States* v. *Nihols*, 4 McLean, 23, 24.) In *United States* v. *Taylor*, 147 U. S., 695, 696, the right of the court to take an acknowledgment to an appeal bond is recognized.

(3) We concede that a considerable majority of the decided cases upon recognizances are against the theory that they may be held good as obligations at common law in case they fail to conform to the provisions of the statute. Cases sustaining the recognizance as a common law obligation are: *Dennard* v. *Georgia*, 2 Ga., 137; *State* v. *Cannon*, 34 Iowa, 322, 325; *State* v. *Mayson*, 2 Nott & McC., 425. These are in accord with the law as to other bonds required by statute or rule of court. (*United States* v. *Tingey*, 5 Pet., 115, 129–30; *United States* v. *Linn*, 15 Pet., 290, 310; *United States* v. *Hodson*, 10 Wall., 395, 406–8; *Jessup* v. *United States*, 106 U. S., 147, 151–52; *The Struggle*, 1 Gall., 476, cited in *The Three Friends*,

166 U. S., —; *Howgate* v. *United States*, 3 D. C. App., 277, 295; *Rogers* v. *United States*, 32 Fed. Rep., 890; *State ex rel. Jean* v. *Horn*, 94 Mo., 162, 165; *State* v. *Purcell*, 31 W. Va., 44, and cas. cit.; *Slutter* v. *Kirkendall*, 100 Pa. St., 307, 313; *Weldon* v. *Colquitt*, 62 Ga., 449, 453–4; *Jones* v. *Gordon*, 82 Ga., 570.)

Other cases are cited in Murfree on Official Bonds, section 430, where the rule was laid down as follows:

> The general rule controlling this subject, it may be remarked, is that bonds intended to be official and statutory, but too defective to fulfill all the requirements of the statute and to be entitled to the privileges pertaining to strictly official bonds, are good as common law bonds, unless they contain provisions contrary to those which are prescribed in the statute or in violation of other rules of the law, common or statutory, or of common policy.

It has been suggested that public policy is against the action of the clerk. It is difficult to see how there can be any public policy which would permit the clerk to take the bond by direction of the court in a *habeas corpus* proceeding and not in other cases also. The public policy objection is well disposed of by Mr. Justice Thompson in *United States* v. *Linn*, 15 Pet., at pp. 314 *et seq.* Some remarks of Elliott, J., in his dissenting opinion in *Rupert* v. *People*, 20 Colo., 424, 428–9, 436–7, are worthy of attention:

> The "loopholes of the law," by which persons charged with crime evade trial, or escape punishment after fair trial and conviction, are a reproach to the jurisprudence of many American states. * * * It may be that the current of authority

is contrary to the views above expressed, taking the number of opinions as the test. But there is sometimes great difference between the current of authority and the weight of authority. The weight of authority depends upon the better reasoning, and not upon the number of opinions. * * * It is fair to presume that, at the time of executing the bond, plaintiffs did not dream of escaping liability on account of some irregularity not affecting the substance of their obligation. To allow them to escape, under the facts disclosed by this record, is one of those unfortunate slips in the administration of the law that brings the law into disfavor, and militates strongly against good government in this country. The slip is all the more unfortunate, because altogether unnecessary. It would be avoided by holding the parties to the fair terms of their contract, as in other cases.

Respectfully submitted.

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